driver trett
ANALYSIS ACTION RESOLUTION

THE DIGEST NEWSLETTER

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In this issue...

Welcome to the Driver Trett Digest

Kevin McPhilomy
Middle East issue – Technical Editor

For this, the fourth edition of the Driver Trett Digest, we are again delighted to offer an eclectic mix of topics provided by our global team and guest contributors.

Our regional focus is on the Middle East (ME), with contributions from our staff in Oman, UAE, and Qatar. To those outside the ME region, attention is undoubtedly centred on Qatar as host to the FIFA World Cup in 2022 (well – for the moment at least!), and the massive infrastructure programme to support the tournament, which alone is expected to be worth in excess of US$150bn. We examine the difficulties facing Qatar in meeting the deadline

In addition, Rachel Larkin of Pinsent Masons and our Dubai-based quantum expert Paul Taplin analyse the proposed Q-Construct scheme intended to deal with the disputes that may arise on such an ambitious programme.

Oman also continues to develop infrastructure and promote itself as a premier tourist destination. We consider Oman's hotel development programme in addition to an overview of the GCC rail project.

Alongside our regional focus, global and contractual interests are well served with a diverse range of articles including the potential issues with letters of intent, a look at conditions precedent or 'time bars' in construction contracts, and consideration of what the NEC3 form of contract really means by a 'spirit of mutual trust and cooperation'. Our range of contractual articles is completed by another guest, John Denis-Smith of Thirty Nine Essex Street, who addresses and explores the consequences of claims in tort.

For those with an interest in 'the dark arts', as delay analysis is often viewed by the uninitiated, we provide articles on Collapsed/As-built delay analysis together with case studies involving rail and high rise projects.

Further variety is provided by another guest contributor, Sarah Wilson of Watson Burton, who provides a review of potential insurance pitfalls for consultants and design and build contractors.

Just over one year ago we established DIALES, Driver's expert witness support service. We consider the rationale behind it and the key importance of developing the next generation of experts. Our regular series of interviews with key personnel continues with John Messenger, our managing director for the Africa region, with his thoughts on Driver Group Africa's activities and the region as a whole.

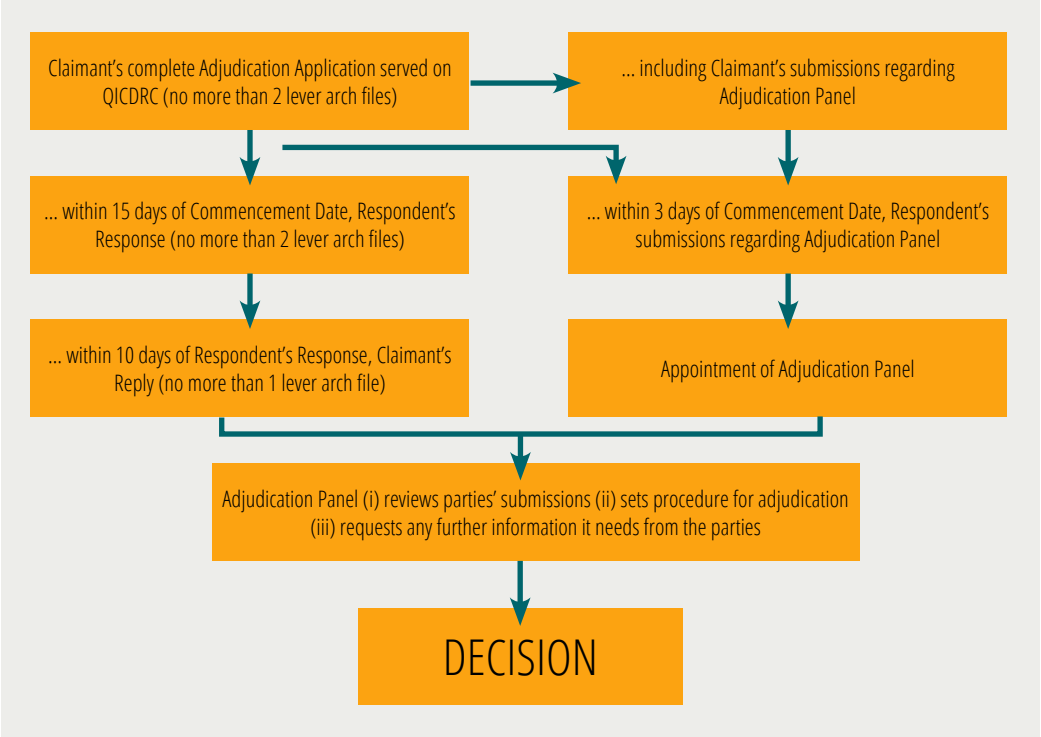
Finally, after a bombardment of information and opinion we move from construction to cookery with a light-hearted view of my gastronomic experiences during a lifetime of working across the globe.

My thanks go to those who have contributed to this issue and in particular our guests Rachel Larkin, Sarah Wilson, and John Denis-Smith.

As always, if you have an article you wish to contribute, have any comments, or wish to see any particular topics in further editions please contact us at info@drivertrett.com. □

Focus on Q-Construct, Qatar's proposed new dispute resolution scheme for the construction industry

PAUL TAPLIN - DIRECTOR OF DRIVER TRETT, RECENTLY RELOCATED TO THE MIDDLE EAST AFTER 23 YEARS IN THE UK, JOINS FORCES WITH RACHEL LARKIN OF PINSENT MASONS, ONE OF THE LAW FIRMS APPOINTED TO THE Q-CONSTRUCT ADVISORY COMMITTEE. TOGETHER THEY SET OUT THE PRINCIPLES OF THE Q-CONSTRUCT SCHEME AND DRAW COMPARISONS, DRAWING ON EXPERIENCE OF OVER 150 ADJUDICATIONS UNDER THE HGCRA.



December 2nd, 2010 was a historic day for the Middle East when, to the surprise of many, Qatar was announced as the winner for the biggest prize in sport. Not even a bid committee made up of Henry Kissinger, Arnold Schwarzenegger, and boxer Oscar De La Hoya was enough for the USA to topple Qatar as the chosen host for the 2022 World Cup. What followed were mutterings and cheap quips about heat and alcohol. But now those have all but been exhausted and talk has turned to what is the very real challenge of building the stadia and infrastructure.

The cost of the World Cup is estimated to be around $220 billion, that's over 60 times more than the $3.5 billion spent by South Africa and, as an interesting comparison, more than the total value of all mortgaged home loans in the UK. So with such a huge task ahead and an immoveable deadline (albeit FIFA still haven't decided whether it should be held in the summer or the winter) how will the authorities ensure that the inevitable disputes that occur on complex construction projects do not jeopardise the opening of the ultimate competition for the 'beautiful game'?

In January this year, the Society of Construction Law hosted HHJ Frances Kirkham CBE, former senior judge and consultant to the Qatar International Court and Dispute Resolution Centre (QICDRC) in relation to the proposed new Qatar dispute resolution scheme, Q-Construct. She was introduced by Robert Musgrove, previously the chief executive of the Civil Justice Council and now chief executive officer of QICDRC, a court of the State of Qatar.

So is it merely coincidence that the individuals involved in developing and administering Q-Construct have considerable experience of the Housing Grants, Construction and Regeneration Act (HGCRA) 1996 which has proved so popular in the UK for the last 15 years? Of course not. The Q-Construct scheme takes its influence from this act and HHJ Frances Kirkham is helping to design a process that draws parallels with the UK adjudication procedure that has been considered by many to have been so successful.

What is Q-Construct?

The intention behind the Q-Construct scheme is to provide for disputes to be resolved by way of a quick and readily enforceable decision which is rendered while the project in question is ongoing, to minimise disruption to both progress and cash-flow. Importantly, the scheme is consensual – that is, the parties must agree to sign up to it.

In summary, the dispute adjudication process (DAP) will usually involve the following stages (See above diagram).

The idea is that from commencement to the rendering of a decision, the DAP should last no longer than 60 days and, indeed, an adjudication panel appointed under the Q-Construct scheme may forfeit its entitlement to remuneration if it fails to render a decision within this time limit.

Not only is the DAP supposed to be quick, it is also supposed to be relatively inexpensive. The Q-Construct scheme fixes the fees which can be levied by adjudicators. Parties' legal costs are not recoverable and whilst in one way this may make the DAP more expensive for parties, the idea behind it is that it will encourage both the parties and their lawyers to take the most cost-effective approach possible in the circumstances.

The adjudication decision is only binding in an interim sense and may be enforced by a summary judgment procedure in the Qatar International Court, this too is similar to the position in the UK. If either party is dissatisfied with the decision - it is after all accepted to be a 'rough and ready' form of dispute resolution - then under the scheme it retains the right to have the dispute finally determined by arbitration or litigation (whichever has

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been provided for in the contract). In other words, a party may have to make a payment pursuant to an adjudicator's award which it believes it should not have to make, but ultimately, it can claim this money back from the other party by commencement of arbitration or litigation proceedings.

The Q-Construct scheme will be supported by a statutory framework confirming the contractually binding nature of adjudicators' decisions; however, this is not the same as 'statutory adjudication' as it exists in some other jurisdictions. Under the Q-Construct scheme there is no statutory 'right' to adjudicate - parties have to agree to do so either in their contracts or once a dispute has arisen. Therefore, the success of the Q-Construct scheme will lie very much within the hands of the employers and contractors carrying out construction projects in Qatar over the coming years.

Parallels with adjudication in the UK

The HGCRA 1996 came into effect on 1 May 1998 and, after an initial slow period, gained in popularity and never really looked back. Quite literally thousands of referrals are made every year to decide all manner of different disputes in a 28 day period, which can be extended by 14 days by the referring party or indefinitely by agreement of both parties. In all but the smallest disputes, it is common for the parties to agree extensions to ensure the adjudicator has sufficient time to consider all of the evidence and reach a decision. The 60 days proposed by Q-Construct seems to be a more reasonable period and probably more accurately reflects the average duration of the majority of adjudications in the UK.

In a similar vein to Q-Construct, the adjudicator's decision is temporarily binding until finally determined by arbitration or litigation and each party bears their own costs. The courts have been very supportive of the process generally and, save for a relatively few instances (largely concerning jurisdiction), will more often than not enforce an adjudicator's decision even in instances where there appears to be questionable reasoning.

Unlike Q-Construct, in the UK there is no limit on the amount of evidence or documentation that the parties can submit, and it is all too common an occurrence to find that the submissions run into five, ten, or 20+ lever arch files. All of which an adjudicator is supposed to consider in four calendar weeks. At the inception stage, consideration was given to limiting the length of submissions but this was abandoned before the Bill was drafted. One can imagine a situation under Q-Construct where the two lever arch files are double the thickness of normal ones, crammed with double sided text of font size six and non-existent page margins.

A cap on adjudicators' fees was never a statutory requirement in the UK although certain adjudicator nominating bodies (ANBs) included a cap as part of their own adjudication rules. The Technology and Construction Solicitors' Association (TeCSA), for example, currently cap adjudicators' fees at £1,750 per day (excluding VAT and expenses). The rising trend in the popularity of adjudication has seen an increase in adjudicators' fees with rates of £400+ per hour not uncommon in central London. This starts to bring into question the cost effectiveness of a process that was intended to be swift and inexpensive.

However, adjudication in itself is not a new concept and perhaps the real reason its use has been so prolific since the introduction of the Act in the UK is that it is a statutory right underpinned by legislation. Regardless of whether there are adjudication provisions in the contract or not, each party retains the right to adjudicate at any time (some exclusions regarding the type of work are acknowledged) and this, it seems, is a pivotal reason for its success.

Perhaps surprisingly it would also seem as though the legislation got much of the provisions right first time because when the Act was amended in October 2011, despite several changes to the payment provisions, adjudication, with the exception of remedying some minor irritations, largely remained unchanged.

Final thought

Adjudication in the UK has been hugely successful for a number of reasons but one of the cornerstones is the legislative underpinnings. It is not a consensual process, if you enter into a construction contract then adjudication is imported as a right by statute regardless of what the contract says.

Q-Construct is consensual and therefore the impetus to use this system has to lie with the parties. In a country where arbitration agreements are routinely struck out of contracts, it seems there is going to be a real need for the Qatari Government to lead by example and embrace a process which is designed to help the parties resolve their differences quickly and economically for the benefit of the project.

In other jurisdictions, where it has been properly implemented, adjudication has become a popular and highly regarded method of resolving construction disputes. This is because adjudication caters to the very real need, within the construction industry, to prevent disputes from interrupting cash-flow and progress to a degree that undermines the successful delivery of projects to clients. Accordingly, the Q-Construct scheme has the potential not only to ensure the timely delivery of the infrastructure required for the 2022 World Cup, but also to act as a precedent for other jurisdictions within the Gulf Cooperation Council (GCC) and wider Middle East region, to follow in implementing similar schemes. Given the success of adjudication in other jurisdictions, this is a move which is to be very much welcomed. □

Qatar's logistical challenges

IN THE LEAD UP TO THE WORLD CUP 2022, PETER BANATHY – DIRECTOR, DRIVER TRETT QATAR DISCUSSES THE DEVELOPMENT OF THE COUNTRY'S INFRASTRUCTURE OVER THE NEXT TEN YEARS.

Qatar, depending on which media report or article you wish to believe, is planning to spend between US$100-200 billion over the next ten years on infrastructure projects and has already committed to some of this expenditure with recent metro and highways related contract awards.

The facts alone are impressive. For the metro system there will be 48 stations, one of which, Msheirib, it is estimated will use more concrete and steel than was required to construct the Burj Khalifa, currently the tallest building in the world. There will be 26 tunnel boring machines (TBMs) whereas the Crossrail scheme currently under construction in the UK will use eight. The long distance passenger and freight rail lines that are planned are to be built from scratch and will eventually link to a GCC wide network with lines connecting Qatar with the Kingdoms of Saudi Arabia and Bahrain.

In addition to the planned new metro and rail lines and their associated works, huge expenditure is planned on other aspects of developing the country's infrastructure including a network of new highways and roads, drainage schemes, water treatment plants, etc., in order to support a rapidly growing population now in excess of 1.6 million people comprising Qataris and an extremely large expatriate workforce.

Of course, due to its reserves of gas, Qatar has enviable wealth for a nation of only 250,000 or so citizens, therefore can afford such extraordinary expenditure. However, as Qatar is host to the 2022 FIFA World Cup, time is relatively short given that a significant proportion of these ambitious plans need to be realised to support that event.

The eyes of not only the footballing community but also of the world will soon begin to focus on just quite how this tiny country - arguably 'punching above its weight' - is going to pull it off.

The challenges are therefore principally logistical rather than financial and not only include sourcing materials and plant but also labour and professional support, especially given the heavy reliance upon an expatriate work force.

So how will Qatar manage all this and what can we expect to see as the country ramps up the implementation of its plans?

As the world at large slowly recovers from the worst of the recession, how will Qatar attract and retain the engineering professionals it will need to fulfil its needs? Specialist rail engineering skills, for example, remain in demand worldwide so apart from the opportunity to earn a tax free salary, what will draw and keep people in Qatar?

Perhaps one answer lies in the unique challenge of designing and building a rail and metro network from scratch in the desert, an opportunity which does not occur very often in a person's career.

Despite this, practical obstacles do exist in attracting professionals to Qatar, and retaining them. One obvious challenge yet to be fully addressed is accommodating professionals with families in a country where the existing infrastructure is already at breaking point. For example, school places for expatriate children are extremely limited, so this is already becoming an issue in terms of restricting recruitment. Perhaps the rumours of schools in Dubai opening up boarding facilities is one potential and imaginative solution, contemplating families locating in the UAE with the breadwinners commuting weekly to Qatar.

Unless Qatar and the specialist engineering and construction companies intend to rely solely on single status professionals or more measures as above for things such as schooling are developed, I suspect challenges to recruitment will remain and may increase over the coming years.

Outsourcing services, such as design, to offices outside of the country is an obvious alleviating measure and is something that to an extent is already happening. However there is a limit to such outsourcing due to the complex interfaces of the various elements of infrastructure that are necessary and an expectation on the part of government bodies that work, wherever possible, should be done 'in country'.

Some unique opportunities therefore exist for construction professionals in Qatar over the coming years but these will not be without certain personal and social related compromises.

Another issue is the challenge of mobilising and accommodating the vast labour force that will be required.

Action is already being taken to build new, bigger and better camps and facilities for labour, the vast majority of whom will come from the Indian subcontinent. New guidelines recently issued by the National Human Rights Committee governing conditions in labour camps and specifying minimum living areas for each person and the banning of bunk beds amongst other things, are a welcome step in the right direction and have come with assurances that compliance will be monitored.

Certainly, given the very high profile of the sporting event that the infrastructure projects are being built to support, trade unions around the world are taking an increasing interest in the welfare of workers who will be migrating to Qatar to work. Furthermore, they appear to be making representations of which the authorities in Qatar are taking notice.

As for mobilising the sheer numbers of additional labour that will be required, the consensus in Qatar seems to be that immigration and visa processing, which can be very bureaucratic and time-consuming, will need improvement. There

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are currently suggestions that the No Objection Certificate (NOC) procedures which restrict movement of employees between companies will be relaxed. However, further and perhaps more far-reaching changes will be needed to ensure that labour recruitment will meet the massive demand required.

There is also the significant challenge of importing vast quantities of materials required - particularly during a period when the rest of the GCC members are also implementing ambitious infrastructure plans such as the GCC rail network (see page 23).

More significantly perhaps for Qatar, is that the Kingdom of Saudi Arabia is developing vast infrastructure schemes of its own. That country, which is normally an exporter of construction materials throughout the region and particularly across the border with Qatar, and which is Qatar's only land border, may restrict exports to ensure adequate resources are available for its own projects, a policy it has implemented previously.

The alternative, to import the vast quantities of materials required by sea, may also prove problematical given that construction of Qatar's new port facilities are rumoured to be in significant delay.

Of course, materials and equipment must be sourced before they can be imported and having invested large sums of the country's wealth in the purchase of Barclays Bank, Sainsbury's, and Harrods amongst others, the authorities may benefit to consider the purchase of a steel manufacturer, quarry, or mine or two.

In the run up to the Asian Games hosted by Qatar in 2006, asphalt was taken up from outlying roads in Doha to be recycled to provide surfacing for new roads being constructed to support the games, so it is to be hoped that such drastic measures will not be needed in the run up to 2022.

Either way, whilst Rome was not built in a day and Qatar has nine years to go; for the reasons described it will take an awful lot of logistical planning and forward-thinking.

I hope better minds than mine have been giving all this some thought and have some clever plans in place. And that they pull it off! □

Claims in Tort: some oddities

JOHN DENIS-SMITH OF THIRTY NINE ESSEX STREET EXPLORES THE ODDITIES THAT RELATE TO CLAIMS IN TORT IN CONTRAST TO CONTRACT CLAIMS AND THE VARIED CONSEQUENCES THAT MAY ARISE.

Differences between claims in contract and tort often seem puzzling to a lay client and one can understand why. Whatever the legal route to establishing a claim against another party, one might after all expect the test to establish liability would be the same in both cases, the only difference being that one can claim in tort against a party with whom one has no contract. If only it were so simple. Instead, one finds that in some ways the difference can matter a good deal and, as recent caselaw emphasises, sometimes in ways that throw up odd consequences. Three of them are touched on here.

What is the damage?

The starting point in contract is simple. The parties have a contract and one of them breaches it. The contract may make provision for the consequences but in any case there is the common law to put a figure on the damage suffered. In tort, by contrast, the rules in construction projects derive from what we would today call a product liability case, Donoghue v Stevenson [1932] A.C. 562, HL. The effect is that, in tort, a party can generally only recover for damage caused by a defective object to someone or to something else. The first complication, and odd consequence, in a construction project is identifying just what 'other property' is. If a boiler is installed in an existing building, the answer seems to be clear: the building is "other property" and, if damaged by defects in the boiler, a claim could be made in tort. However, matters become complicated where, for example, a subcontractor is installing one element to a project where other elements are being installed by others at the same time, perhaps under the umbrella of the same contract between the main contractor and ultimate client. Once upon a time, it was indicated that in the case of such 'complex structures' one element of the structure should be regarded as distinct from another (see D. & F. Estates v Church Commissioners [1989] A.C. 177). However, the courts have rethought this on several occasions. Foundations are generally not considered separate from the rest of the buildings. Nor are firestopping features. Thus, in a case of refurbishment works including the installation of insulated chilled water pipework and corrosion was said to have been caused by defects in the insulation work, the court took the view that the insulation should not be treated as different property from the pipework (Linklaters Business Services v Sir Robert McAlpine Ltd [2010] EWHC 2391, TCC).

> The starting point in contract is simple. The parties have a contract and one of them breaches it.

The consequences can be striking. Sometimes, the legal team must investigate the history of the construction of a property and its neighbours to see whether a claim in tort can arise. In one case, a contractor constructed a row of three terraced houses sharing a roof. The houses were of course sold to separate purchasers. Subsequently, the roof to one 'property' lifted and damaged the living space of another. It was held that this was not separate property for the purposes of a claim in tort: the houses were built together and formed only a single property (Broster v Galliard Docklands Ltd [2011] EWHC 1722, TCC). This, the court suggested, was an obvious result. To a construction professional it may be, but the owner of a damaged home would be surprised to learn that it is treated as being the very same property as its neighbours. There are also implications for insurance claims. In a recent case it was held that the public liability section or the contractors' all risks section of a commercial combined policy did not provide the insured contractor with cover where the contractor was being sued only for damage to the very thing it was alleged to have defectively designed and installed, but not for damage to any other property (AXA Insurance UK Plc v Thermonex Ltd [2013] T.C.L.R. 3; [2013] Lloyd's Rep. I.R. 323).

The time for action

A second consequence affects the right to bring proceedings. The limitation period in both contract and tort is generally six years from the date on which the cause of action arises. However, in contract the cause of action arises on breach; the last point typically being the date of practical completion of the works. In tort, time runs from the date damage was sustained. Here the law remains caught between changes in judicial philosophy. The leading case dates to 30 years ago: Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 A.C. 1, in which the House of Lords decided that the cause of action in tort arises when physical damage first occurs within the relevant building. However, that was

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decided at a time when defects in the property itself could give rise to a claim in tort. As explained above, that is no longer the case. One is left with decisions in which the courts have struggled to identify when such damage occurred if the defect does not go on to cause damage (but where there is still a duty of care). The House of Lords (as it used to be) in its manifestation as the Privy Council has suggested in a New Zealand case that the date should be the date when the damage becomes so bad, or the defects so obvious, that any reasonable home owner would call in an expert, since this marks the moment when the value of the building is depreciated, and therefore the moment where the economic loss occurs (Invercargill City Council v Hamlin [1996] A.C. 624, PC, in which four members of the then House of Lords took part).

However, in English law, we are left with a Court of Appeal decision in which the court was forced to apply Pirelli (Abbott v Will Gannon & Smith Ltd [2005] EWCA Civ 198; [2005] B.L.R. 195; 103 Con. L.R. 92, CA); only a decision by the Supreme Court can resolve this.

Was the claimant to blame too?

A third odd consequence arises where the claimant has been at fault in some way. In contract, no reduction is made in such circumstances (unless, most unusually, the court holds that the claimant should be treated as having caused the damage itself). In tort there is the doctrine of "contributory negligence" and, in such circumstances, originally the claimant could not recover at all. There is now the Law Reform (Contributory Negligence) Act 1945, under which the court instead may reduce the damages awarded to the claimant. This means that a defendant contractor now has a perverse incentive to say it is in breach of more duties than the claimant alleges. The claimant pleads a claim for breach of contract and the contractor declares itself also to have been in breach of a duty in tort, so that the damages should be reduced to reflect any blame which may attach to the claimant. The courts seek to approach such defences robustly. In a recent case, a contractor was found liable for causing a fire during roofing refurbishment works. The court rejected an attempt to reduce the damages by reason of the Employer's alleged contributory negligence, holding that the duties in issue were strict duties and hence the principle of contributory negligence did not apply (Mueller Europe Ltd v Central Roofing (South Wales) Ltd [2013] EWHC 237 (TCC); 147 Con. L.R. 32). However, the existence of the anomaly will surely vex the court in future cases.

How will such issues be resolved and is there an overriding tendency in the courts to seek to resolve them in a given direction? The answer may be yes. In a 2011 case, Robinson v P.E. Jones [2011] EWCA Civ 9; [2012] QB 44, the Court of Appeal seemed to indicate that the courts should be less ready to impose duties in tort and leave it to the contract to determine who is liable and to whom. The leading judgment was given by Lord Justice Jackson, author of the report on Civil Justice reform being implemented now. Will the decision in this case mark a similar sea change? Thus far, subsequent cases commenting on it seem to treat it as marking the new orthodoxy. However, it will take some time before the position is clear. In the meantime, clients need to be aware that the law still bristles with complications. □

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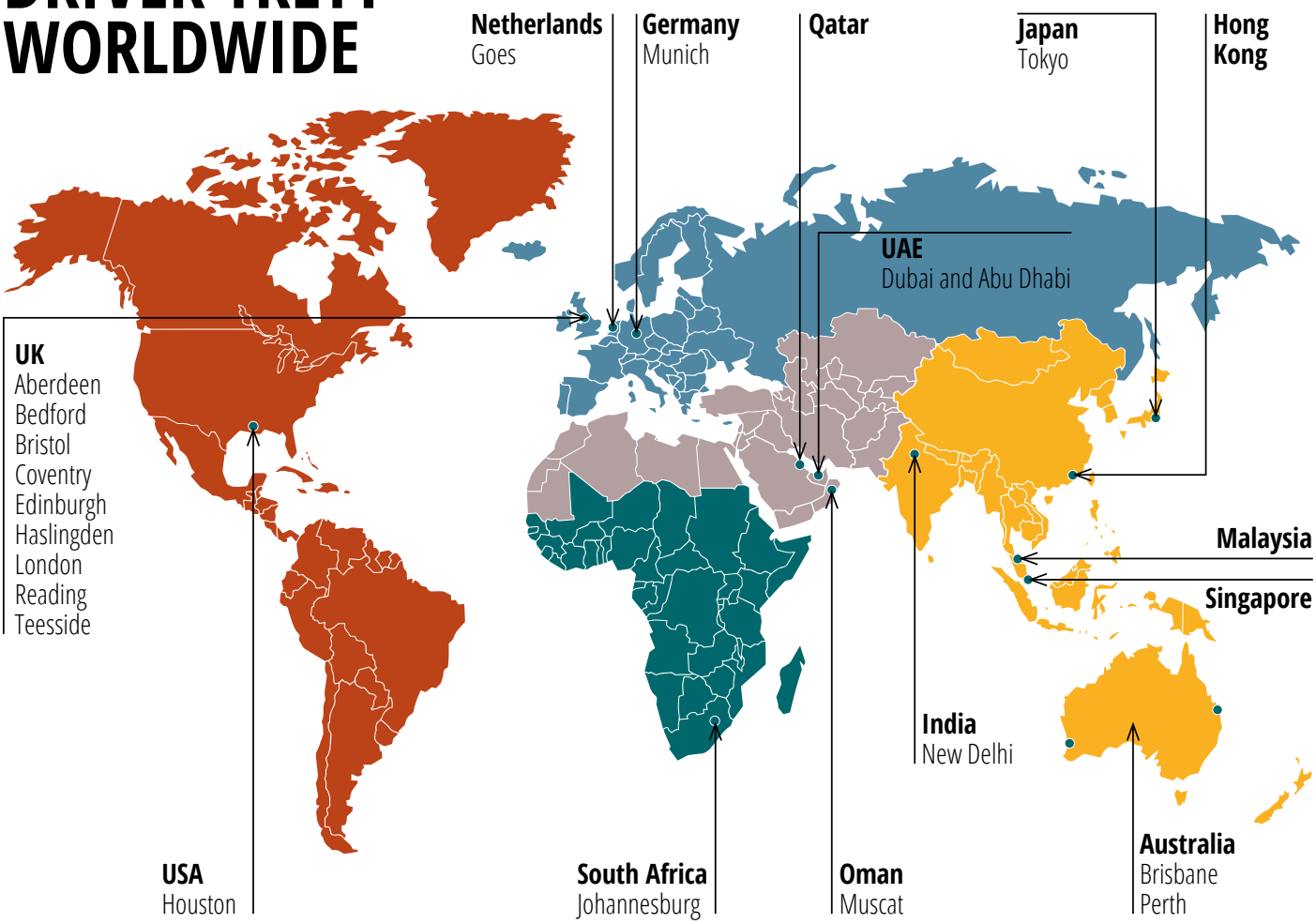

The changing application of construction industry payment legislation in Australia

DAVID HARDIMAN – DIRECTOR, DRIVER TRETT AUSTRALIA DISCUSSES THE SIMILARITIES AND DIFFERENCES FOUND IN PAYMENT LEGISLATION ACROSS THE COUNTRY.

Today, all the states of Australia operate construction industry payment legislation. New South Wales was the first Australian jurisdiction to introduce the legislation in 2000. It was followed by Victoria in 2003, Queensland in 2004, and Western Australia and Northern Territory in 2005.

The legislation follows two distinct models which have been termed the East Coast and West Coast models. The West Coast model, used by Western Australia and Northern Territory, is modelled on the UK Construction Contracts Act. The East Coast model used by Queensland, South Australia, Tasmania, and Australian Capital Territory is modelled on the New South Wales Act which in turn is based upon the Housing Grants, Construction and Regeneration Act 1996.

The current state of construction industry payment legislation throughout Australia is somewhat fragmented and commentators have called for harmonisation. In December 2012, the Queensland government released a discussion paper seeking public submissions on a broad scope of reform subjects. Public submissions are now closed and the Government's findings are eagerly awaited.

One significant area where the East Coast and West Coast models are dissimilar is the definition of work that does not constitute construction work carried out or the supply of related goods and services under a construction contract and for which there is no right to serve payment claims under construction industry payment legislation.

Section 10(3) of the Queensland Act provides that certain activities are not construction work (the mining exclusion). These activities include:

- The drilling or extraction of oil, natural gas or minerals.
- The extraction, whether by underground or surface working of minerals, including tunnelling or boring or constructing underground works, for that purpose.

The Western Australia Act includes a much wider list of work that will not be considered construction work. This list includes:

- Any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance.
- A shaft, pit or quarry, or drilling for the purposes of discovery or extracting any mineral bearing or other substance.

The Queensland Court has reviewed several decisions made by adjudicators and has provided clarification as to whether certain work constitutes construction work under the Act. These decisions indicate that, in Queensland, the courts have adopted a narrow interpretation of the mining exclusion and the reach of the construction industry payment legislation was possibly broader than it was previously understood to be.

In Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd [2011], the Queensland Court decided that the excluded work did not extend to work that was for the purpose of opening or is preparatory to operating a mine (clearing and grubbing, stripping the topsoil, and creating dams and drains to prevent inflows from running into the pit and rehabilitation).

In its decision, the court made several observations:

- The work was for collateral purposes not for the physical extraction of coal.
- Machinery intended to be used directly for mining would fall under construction work when also supplied to carry out collateral work to be built before major digging occurred.
- The work was different from the processes used to physically extract the coal.

Whilst the judges of the Court of Appeal reached the same conclusion, they provided a variety of views on whether certain works at a mine were construction works.

In HM Hire Pty Ltd v National Plant and Equipment Pty Ltd and another [2012], the Queensland Court decided that work of excavation and removal of timber and topsoil from the site for the purposes of constructing and forming an access road was not excluded work.

The Supreme Court of Queensland has recently published a decision that construction work on mining leases will generally not be construction work for the purposes of the Building and Construction Industry Payments Act 2004 (BCIPA). This decision sets a significant precedent for the mining and construction industry. It could operate to invalidate payment claims issued in relation to construction work on mining leases.

In the case Agripower Australia Ltd v J & D Rigging Pty Ltd & Ors [2013], the court was required to consider whether mining plant consisted of structures or works forming part of the land within the meaning of the Building and Construction Industry Payments Act.

The court found that mining leases are not land. A mining lease entitled the leaseholder to extract minerals and carry out collateral activities until the expiry of the lease. On the basis of the Court's decision, construction works performed on land, the subject of a mining lease, is not construction work under the Building and Construction Industry Payments Act.

This decision could broaden the application of the mining exclusion in Queensland and is likely to have influence on other jurisdictions. The court's reasoning could equally apply to land which is the subject of a petroleum lease or a gas lease.

It will be interesting to see whether the decision is appealed.

The State Government's current review of the provisions of the Building and Construction Industry Payments Act includes the scope of the definition for construction work. In the meantime, there is certainly a possibility of a resurgence of arbitration and alternative methods for the resolution of payment disputes in the energy sector in Queensland. □

Why another expert?

PETER DAVISON – HEAD OF DIALES EXAMINES THE IMPORTANCE OF EXPERTS AND THE DEVELOPMENT OF THE NEXT GENERATION.

In June last year Driver Group launched DIALES as their expert witness support service brand, in order to provide clients and the legal world with an identifiable source of experts in quantum, planning, and technical issues for construction disputes worldwide. The past year has demonstrated that DIALES has become recognised and attracted interest from many quarters. So, as we pass the first anniversary of the brand, it is a good time to further consider the rationale for DIALES.

'Lord save us from experts!' is an often quoted saying in the legal world. This sentiment is the result of difficult experiences with experts engaged to provide opinion evidence on a client's case only to find that the opinion is poorly researched, badly presented, or the expert fails to support his written evidence when challenged under cross-examination in a hearing. To state the obvious, such failings have serious consequences for clients who are consequently left with a damaged case which may fail wholly or in part because of the difficulties with the expert evidence. So how does DIALES address these concerns?

Firstly, it recognises that while good technical and professional qualifications and competence are the basis for all expert work, they are not sufficient in themselves. It is not possible to give expert opinion on a subject unless the expert not only has the technical and professional qualification but also has good practical experience of the subject matter. A background of hands-on experience is required to temper the technical and professional training. This might seem trite but in my experience I have encountered an accountant giving expert opinion on the measurement and valuation of engineering construction work and a former house builder giving expert opinion on the construction of an offshore FPSO. Needless to say both had real difficulties and did not help their clients as a result of their lack of familiarity with the subject matter, although both had considerable experience of giving expert evidence on matters within their own experience. This is important because it is not realistic to expect every quantity surveyor to be able to measure and value all the differing forms of building, civil, and engineering construction works, or to expect a planner to be able to analyse time and delays on a project to construct something outside their experience. DIALES experts are not only qualified technically and professionally but have hands-on experience of the matters on which they offer opinions.

However, while being the prime requirement for an expert, professional competence and experience are not the only considerations. Experts must be aware, through training or hands-on experience, of the requirements over and above their technical and professional capability. Many professional bodies set requirements for members undertaking expert work in its many forms, but further to this there is a need to understand the legal framework for expert evidence in the jurisdiction, be that garnered from case law sources in common law jurisdictions, statutory requirements, or civil code requirements. It is sometimes difficult for the professional new to expert work to comprehend that the prime duty of an expert is to the tribunal and all this implies. Many readers will have experience of the 'hired gun' expert who will support the client's case despite conflicting evidence or their own knowledge and experience indicating deficiencies. Such experts do not in reality help their clients at all. Too often their client is encouraged to pursue defective claims with ultimate disappointment, usually at great expense. It is sometimes possible to overcome deficiencies in a case if the expert gives early objective advice, to the client's benefit, and an expert should be aware that it is objective independent advice that results in the maximum benefit to the client. DIALES experts are not 'hired guns' but are aware of their duty to the tribunal and how their expertise can best assist the client.

Finally it is worth considering the experts' ultimate test, that of supporting written evidence under cross-examination. Experienced experts have been through cross-examination and have had the opportunity to test themselves and to demonstrate that they can support a well-researched report under the most stringent examination. However, there is often a real reluctance on the part of clients and their legal teams to accept an expert, no matter how well qualified and experienced, unless they have successfully presented evidence in a hearing. This raises a 'chicken and egg' scenario if no one will instruct an expert who has not been cross-examined. The answer with DIALES has been the establishment of a development group of well qualified personnel who have undertaken, or wish to undertake, expert work but have not been cross-examined. Through the development group they are afforded appropriate training from specialist providers. DIALES experts have been cross-examined and there is a talented group of professionals behind those experts undertaking training to meet the needs of clients and legal teams.

Undertaking expert commissions is an exacting and demanding area of professional practice. DIALES is designed not just to be a brand but to be a practical vehicle supporting and developing experienced experts and the next generation of experts. □

Q&A: John Messenger

JOHN MESSENGER – REGIONAL MANAGING DIRECTOR FOR DRIVER GROUP IN AFRICA TALKS ABOUT ESTABLISHING A LOCALLY BASED COMPANY AND THE DEVELOPMENT OF OUR SERVICES IN THE REGION.

How would you describe your role within Driver Group?

It is my pleasure to be the Group's managing director for Africa. In joint venture with a local company (SADC Project Consulting) we set up the regional business in 2010, registering a local company in the name of Driver Group Africa. I am the Chairman of the local business and our resident local managing director is Gerhard Bester. We operate throughout Africa from our regional offices in Midrand which is mid-way between Johannesburg and Pretoria.

What are your aims for the business in the region?

Many European organisations take an opportunistic approach to work in Africa, coming and going for individual projects with no real commitment to the region. I always wanted to adopt a different approach and to develop a locally based company providing services which are culturally attuned to the African market place. We therefore set out to develop and integrate the best of local and international consultancy resources in a regionally based business which contributes to economic growth and which develops local people and capacity. We fully intend to extend this approach into other African countries and to set up local joint venture offices whenever possible.

What services do you provide in the region?

Driver Group Africa currently offers a comprehensive claims and disputes service (inclusive of expert witness services where they are required) and a project management service, ranging from transaction and lenders technical advisory services for public private partnership (PPP) projects through to a complete project management service covering all stages of project development and delivery.

Any plans for expansion?

We are expanding rapidly and from October of this year we are going to add a full project controls service which will provide clients with bespoke specialist services which they can add to their own project management teams, (i.e. programme scheduling, cost management, contract administration, change control, site supervision, etc).

With this addition we will have the full Driver Group services available, as outlined on our website.

We are particularly excited about the prospects for our programme scheduling discipline, which we see as central to all projects and an important area in which local services across the industry need strengthening. Over the last six months we have developed a training programme, currently going through accreditation, and which we expect to launch in October. This will allow us to offer clients a variety of support from training of their own staff through to the provision of programming, as a bespoke service, on-site or from our offices on a part-time basis.

Are you recruiting for any key roles?

We are recruiting for key roles at all levels and across all services on a continuous basis. We have been particularly pleased to find a number of African nationals in the UK and the Middle East who have been looking for an opportunity to return home but to remain with an internationally recognised consultancy practice. In future we hope to be able to offer international opportunities to staff throughout the Driver business, by arranging exchanges between the regions on short to medium term assignments.

What can clients expect from Driver that they don't currently get in the market place?

Driver Group Africa aims to provide consultancy services renowned for their integrity, independence, fairness, and professionalism at the highest level. We aim to raise the standard in everything we do and to provide clients with a better service, which allows them to deliver their projects with greater certainty.

Are there any particular sectors you will be focusing on in the next few years?

The development of the PPP (concessions) market place remains very slow throughout Africa. We believe that this represents a missed opportunity as it could provide African governments with a significant means of outsourcing major infrastructure development and funding. PPP provides a means of paying for facilities and services as they are used rather than incurring the full building costs at the outset. This would enable governments to improve the provisions of basic services to the population and maximise their economic development potential through the efficient use of limited resources.

Developing PPP projects and delivering them through the feasibility and procurement stages is a major effort which places huge demands on Government staff and consultants alike, many of whom may not be familiar with the different procurement approach and processes that PPP demands. Understanding the nature of PPP as a partnership between the public and private sector and being willing to engage with the private sector at an early stage is vital if the process is to be successful.

Despite the problems of PPP procurement, we feel that it is a major opportunity for Africa to develop both by providing essential infrastructure and services, (which promotes economic growth) and also through creation of the large number of extra jobs that come from expanding those particular service sectors and the economy at large.

Driver Group Africa is currently the lead transaction advisor for three of the major South African PPP hospitals developments and has provided PPP management support services to other African countries. We are fully committed to providing PPP services to both government and concessionaires and aim to contribute to re-establishing the PPP market place and the interest of all parties. □

Letters of intent – still popular, but now with a health warning

MARTIN TYRRELL – SENIOR ASSOCIATE DIRECTOR, DRIVER TRETT UK HIGHLIGHTS THE POTENTIAL RISKS INVOLVED IN RELYING ON LETTERS OF INTENT AND EXCEEDING THEIR COMMITMENTS WITHOUT FURTHER BINDING CONTRACTS.

Many trends have come and gone, but perhaps one of the most enduring is the letter of intent (LOI). In times of boom or recession there are always reasons and excuses for their use. Although the term is used for a wide range of documents, a true letter of intent is often difficult to come by. There is, more often, little or no intent to move on from the current exchange of correspondence, no matter what it says in the letter. Here I share some of my experiences and observations, and also include a reminder from last year's action in the courts not to be caught holding one if you are a professional advisor, or the party responsible for carrying through the intent to final execution of the contract.

I have not repeated here the reasons for letters of intent, but will suggest that if those reasons are genuine then they are worth stating in the letter itself. As a prime example, an LOI may be given to a subcontractor by a contractor already operating under its own letter of intent. The spectrum of reasons is wide, and unfortunately does include simply failing to put sufficient effort into submitting or executing the correct documents.

Arguably the main uses of LOIs are to limit overall expenditure and duration of the initial commitment. But saying that an agreement expires on a given date and that the recipient will not be reimbursed beyond a certain sum are not matters unique to letters of intent. They are of course similar to some of the essential provisions of normal agreements or construction contracts, just with differing remedies.

This is a suitable place to point out that simply stating that there is intent to enter into some more detailed form of contract in the future does not necessarily mean that the intent exists, or that its final execution will ever be necessary. Many letters contain all the essential terms of a binding contract, despite containing protests to the contrary, and they are therefore enforceable in their own right.

Whether separate binding contracts, or simply intentions that do not bind beyond limited reimbursement of costs, these letters rarely travel in isolation. It is common for us to see a series of such letters. They may either progressively increase the time period and level of reimbursement, or may form a series of letters where each forms a fully binding agreement in its own right.

Another common feature surrounding these letters is for the parties to behave as if they did not exist, and that they had in place the contract that is envisaged in the future. Common behaviours include having a letter that specifies the method of reimbursement of expenditure but consistently paying at bid rates identified in the documents of the proposed contract, and continuing to work into a time period yet to be covered by the future contract even though the letters of intent have long since expired.

I have heard, and debated, arguments that the recipient's actions in applying for (future) as yet unexecuted contract rates, and being paid them, demonstrates intent to be bound by terms that would otherwise not be in place. Of equal force is the argument that they just got it plain wrong and acted contrary to the terms of the letter, either because they did not read it, understand it, or did not want to do what it said. It is of course, on the face of it, an error by the paying party. After all, payers are usually very quick to point out where an application is wrong. So it lacks any serious persuasion for the payer to argue that it did this because the payee made it respond in that way.

Additionally we have seen time periods expressed as durations without reference to start or finish dates. By far the safest approach is a definitive date. That may seem obvious, but here again is a trap for the parties. The promoter of the letter is often very diligent in providing a date, but it is not uncommon to see that date expire and the parties sail happily on as if they somehow had in place terms of an as yet unwritten and unexecuted agreement.

One situation that often sparks unnatural speed and action from a dilatory employer, or main contractor, is delay and additional expenditure. There is often an urgent flurry to finally promote an executable contract that still includes completion dates that have already become unachievable, and values that have long since passed. This could be because the employer feels vulnerable with an existing letter of intent that offers reimbursement of expenditure, and feels threatened by that other pitfall of these letters; the risk that liquidated damages (or any other delay damages) cannot be levied.

Such letters that offer reimbursement also include advantages for the contractor or subcontractor that may be delayed or disrupted in its performance. It may no

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longer be necessary to separate expenditure for these discrete issues, provided the overall expenditure is reasonable. And it is arguable that it may be unnecessary to attribute the additional expense to any particular causation that is stipulated by a contract that is yet to be concluded and executed. It may simply be necessary to keep watch on the unexpired dates and spending limits in the letter.

So if the party presenting the letter of intent is potentially vulnerable in these areas, what can it do to protect itself? The obvious answers are to execute a contract at the outset that includes all the essential restrictions that it seeks. Alternatively, and at the other end of the spectrum, to hold accountable and claim damages from its professional advisor if it has been dilatory in advising on risks and promoting execution of the contract. This is the health warning we referred to; the judgment in Ampleforth Abbey Trust v Turner and Townsend [2012]. I recommend it to Digest readers. Unlike many judgments it keeps the interest, if only because it has more inevitability with each turn of the page. The important message, as is often the case, is not the finding that a project manager owed a duty to apply sufficient pressure for an executed contract, and to advise its client that there were serious risks, including those of not being able to levy delay damages; it is that there were avoidable damages that were incurred in the first place, which would thereafter require serious investment to recover.

It is also fascinating to see some of the intense detail that goes into some provisions of letters of intent. That finite detail is often included in place of some of the fundamentals that were perhaps taken for granted and did not make it into the letter. We have seen great detail on intellectual property rights, and detailing of partial or complete design obligations, but they have also been accompanied by an absence of time limit or proper financial restriction.

What all of this reveals is that it is most likely a recipe for disaster to imagine that such a letter would successfully include all the protections and remedies that are otherwise provided within a properly executed contract. To do so would require the full details from the proposed contract together with further restrictions in the short-term on some of those rights and remedies. It is not uncommon to see attempts at such wording in letters of intent. But it is not difficult to see the lasting confusion caused by a letter that purports to be both based on the terms of a contract that is yet to be executed, and also to have no intention to bind the parties to those terms. Many of you will have read more than one such example.

Common sense would suggest that such an intention or agreement would occupy more space than the proposed contract, not simply a couple of pages with a bold heading to suggest it may be a letter of intent. Certainly for a professional adviser or administrator of a client's (yet to be executed) contract, there must be far less risk and effort in drafting and promoting the proper forms of agreement than in doing it badly and spending a much greater effort in defending the subsequent action from the client.

If there remains a determination to issue such a letter, a checklist for starters could include:

- Giving written reasons for the letter
- Financial limits
- Basis of payment
- Time limit
- Scope and specification
- Limitation of remedies or actions

And now there are the added ingredients to apply sufficient effort to get the intended contract executed, and sufficient advice to the client on the full extent of risks if that is not achieved. □

The obvious answers are to execute a contract at the outset that includes all the essential restrictions that it seeks

Insurance pitfalls for consultants and design and build contractors

SARAH WILSON – PARTNER IN THE CONSTRUCTION AND ENGINEERING DEPARTMENT OF WATSON BURTON, EXPLAINS THE MOST COMMON PITFALLS TO PROFESSIONAL INDEMNITY AND PUBLIC LIABILITY POLICIES.

A risk with all insurance policies is that you inadvertently do something which invalidates the policy with the result that you will have to meet any claim made yourself. Set out in the box opposite is a brief explanation of public liability and professional indemnity insurance, and over the page are the top ten most common insurance pitfalls of which you need to be aware.

CONTINUED ON PAGE 12

PUBLIC LIABILITY INSURANCE – WHAT IS IT?

This protects you in the event of accidents – to any person for death, injury or disease, and for accidental loss of, or damage to, property.

Cover is on a 'loss occurring basis' so there is no need for it to be maintained after the project has been completed. Usually cover is for any one loss and includes your defence costs, any awards, damages, and rectification costs.

PROFESSIONAL INDEMNITY INSURANCE – WHAT IS IT?

This protects you from claims of professional negligence, e.g. negligent design and negligent performance of professional services, such as surveying, project management, or contract administration.

Cover is on a claims made basis, so a claim made against you in 2013 will be dealt with under your 2013 insurance policy, even if the work was carried out several years earlier.

Cover usually includes defence costs, any awards, damages, and rectification costs.

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TEN COMMON PITFALLS TO BOTH PROFESSIONAL INDEMNITY AND PUBLIC LIABILITY POLICIES

1 Never admit liability

Never admit liability or settle a claim without the written consent of your insurer. This extends to expressions of dissatisfaction (as they may later become claims).

A particular grey area is where meetings take place to discuss problems. Ensure that you make it clear that any settlement would be 'without prejudice' and on a commercial basis. Also, any remedial works should be carried out, without admission of liability on your part.

2 Failing to notify

It is critical that you notify your insurer of any claims or potential claims as soon as you are aware of them. Failure to do so could invalidate your policy and the insurer will not indemnify, leaving you to pick up any claims.

Often an insured party worries that several notifications during the course of a policy year may cause problems at renewal. However, usually the insurer simply regards this as good risk management by the insured.

3 What work is covered?

Check your policy schedule to ensure you are covered for all the works or services that you are intending to provide. Often insurance policies that are cheaper may look like they will cover you for any losses but in the fine print they contain specific exclusions in them. Examples of exclusions are working abroad and excluding certain types of (risky) work.

5 Ensure insurance requirements are back to back with the actual cover maintained

Any contract you are considering should be sent to your broker who will be willing to review to ensure that you have a programme of insurance to cover your contract. Problems often occur when contracts are signed which contain insurance requirements more onerous than the policy held. For example, insurance is often requested for 'any one claim' but professional indemnity insurance can be 'in the aggregate'. Your broker can assist with this in the tendering phase. The insurance that you maintain should be brought to the client's attention, and they may be happy to accept the (lesser) insurance that you hold rather than what is stipulated in the tender document (but remember that your contract should be amended to reflect this).

6 Beware of fitness for purpose and indemnities

Your lawyer can also advise on any onerous conditions which could invalidate your cover. Often clauses are inserted in an attempt to place additional risks and liabilities onto you. For example a fitness for purpose obligation, which is a much tougher standard than the usual of reasonable skill and care, effectively means that you are guaranteeing the result of your work. Such clauses are almost always excluded from your insurance cover.

Indemnities are also problematic as they are usually excluded from your insurance cover. An indemnity clause will extend your liability; there is no duty on the claimant to mitigate losses and proceedings can be started outside the normal limitation period.

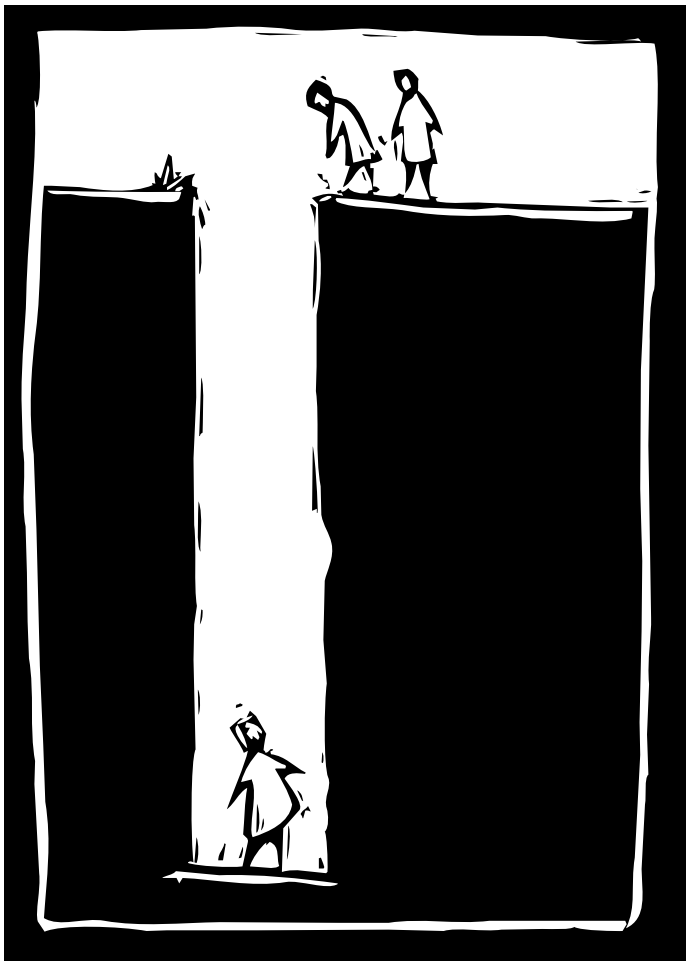
7 Limit your liability

It is good practice to limit your liability as much as possible.

There are a number of ways of doing this, for example excluding indirect and consequential losses, and loss of profit limiting claims, to a certain amount or limiting the time in which claims can be made against you. Alternatively, agree a net contribution clause, so your liability is limited to the extent for which you are liable, so you are not taking on liability for other parties that also contributed to the losses.

8 Be aware of your duty to mitigate

Often insurance policies will contain a condition that a payment will not be made unless you make a reasonable effort to minimise any loss damage or liability. So if a circumstance arises which is likely to cause a loss to your client, you should be taking measures to reduce those losses.



For example, this may mean that you carry out work to remedy the initial defect complained of (but beware of making admissions – see point 1 above).

9 Make sure any advice that you give/receive is in writing

Documenting what you do is key to standard risk management.

If you give any advice in the course of a project, even if your client ignores it, you should record it in writing, as you may need to rely on that evidence if a claim is brought against you.

10 Preserve any evidence

Maintain all files, emails, documents etc., relating to every project. Again, whilst expensive and sometimes time consuming, this is standard risk management. If any key witnesses are leaving the practice, make sure you have discussions with them about providing witness evidence should a claim be brought against you.

Generally, you are liable for your work under contract for six years from completion, under deed for 12 years from completion, and in negligence potentially for 15 years. There are then further time periods that can apply. Obviously you need to assess the risk, but we recommend retaining documents for at least 20 years from completion of a project.

TO SUM UP

Whatever insurance you are required to maintain under your contract, the key things to remember are to ensure your contract terms are in accordance with the requirements of your insurance, be aware of onerous clauses and read your policy and share its terms. Involve your broker and legal advisors early, whether that is at the time of contract negotiations or if you face a claim, and if in doubt be cautious because small matters can turn big! □

Collapsed as-built – common sense or no sense?

ANDREW AGATHANGELOU – ASSOCIATE, DRIVER TRETT UK SEARCHES FOR A SENSIBLE APPROACH TO DELAY ANALYSIS AND REVIEWS THE PRACTICALITIES OF VARIED ANALYTICAL OPTIONS AVAILABLE TO DELAY EXPERTS.

As-planned versus as-built conducted within 'windows'

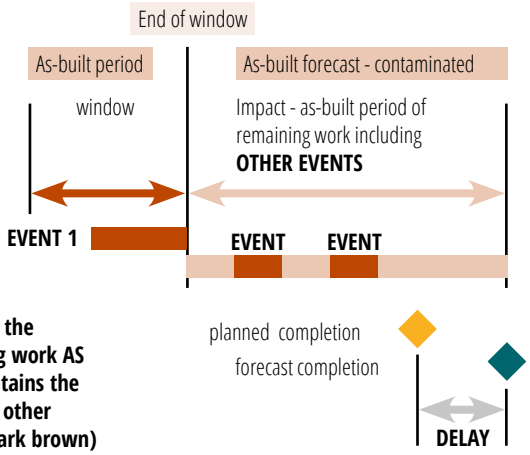
A recent case in which I was appointed as programme expert highlights the arguments that can arise if using a pure as-planned versus as-built programme analysis to demonstrate the causes of delay and to quantify the periods of critical delay. The opposing expert undertook an as-planned versus as-built analysis, based upon a series of 'windows', and then proceeded to make precise assertions as to the cause and amount of critical delay in each window, without the benefit of either a critical path or a separate programme analysis for each of the window periods.

Without a critical path, or an as-built critical path, it is difficult to substantiate where the critical path might lie in each window using this approach, and in turn substantiate the cause of critical delay. Further, the as-planned versus as-built method of analysis is a static method of analysis which simply compares planned dates with as-built dates. The effects of delay events are not calculated as with other dynamic methods of analysis; they are assessed based upon the experience of the delay expert and his or her interpretation of the contemporaneous records.

The programme expert conducting the as-planned versus as-built analysis also asserted that he was not relying on a theoretical forecast (dynamic) of the delay to the completion date in each window, as he was using an as-built programme analysis (static) which he then stated was, in fact, grounded as it relied solely upon as-built dates.

However, an as-planned versus as-built analysis, conducted in a series of windows, is in fact a forecast. This is because each window represents a particular point or period of time during the works. The delay expert therefore has to assess the impact of current delay events within each window upon the remaining future works, and thereby the future completion date. Using a series of windows to conduct the as-built analysis effectively requires the delay expert to forecast or assess the future effect of the current delay events that occurred within that window. This is illustrated in Figure 1 above.

Figure 1 – As-Planned versus As-Built Analysis (Forecast)



It can be seen from the above diagram that conducting an as-planned versus as-built analysis within a series of windows could potentially be inaccurate because the as-built forecast of the impact of delays upon the remaining works also includes the effects of other future delay events, and is therefore contaminated. This makes it very difficult to determine with any degree of certainty whether the delay to completion identified above is a result of the delay events under consideration in the window, or future delay events not under consideration that occurred outside of the window, which also comprise the as-built period of the remaining works.

Using this approach, it is therefore difficult to isolate a specific delay event in the window and determine with any degree of certainty whether that delay event caused a delay to the completion

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date, or its actual effect upon the timing of the as-built remaining work, because the as-built period for the remaining work can be contaminated by the effects of other future events/delay events.

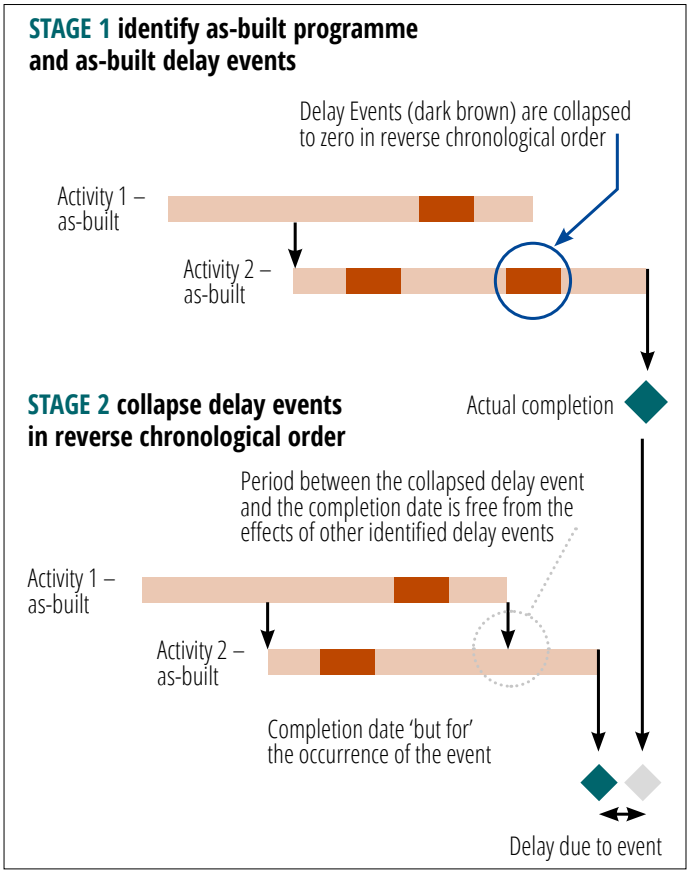
Collapsed-As-Built Alternative

An alternative method of analysis to isolate events and avoid the issue of 'contamination' is collapsed-as-built.

In simple terms, this type of analysis requires each employer culpable delay event to be collapsed to zero, and the remaining works rescheduled, to assess what the completion date would have been 'but for' the occurrence of the event. The employer culpable delay events are collapsed in the reverse chronological order in which they occurred, starting with the very last delay event and working backwards to the very first delay event. The events are collapsed in this way because the starting point is the as-built programme (including identified delay events) as it stood at the end of the works. This also ensures that after the delay event in question is collapsed to zero, the period of time between the collapsed delay event and the completion date is free from contamination by the effects of other events. This is illustrated [below].

The net result at the end of the analysis, once all the employer delay events have been removed from the as-built programme, is a new programme which shows the completion date the contractor would have achieved, less the delays for which the employer is held responsible. If the completion date is still later than the contract completion date, this period of time can be held to be the period of delay for which the contractor is culpable. Therefore this method calculates both the employer and contractor culpable delay, rather than relying on a subjective assessment using the as-planned versus as-built method.

At first glance, the concept of progressively removing the as-built delay events from the overall as-built period, to see what the completion date would have been had the event not occurred, would appear to make sense. The concept is easily understood both visually and intellectually.



It is incumbent upon the expert to select the appropriate method of analysis

However, whereas a pure as-built approach is a static method of analysis which compares the planned and actual dates the works were undertaken, the collapsed-as-built method is actually a dynamic method of analysis which relies on logic to be inserted into the as-built programme in order to reschedule the remaining activities after the event in question is removed.

Therein lies the first criticism of the collapsed-as-built method of analysis. The logic inserted into the as-built programme has to fix into the as-built bars to their correct as-built start and completion dates. This raises questions as to whether the logic therefore reflects the reasonable sequence of the works or is simply a fix, designed to place bars to the correct position.

As the collapsed-as-built method of analysis is a dynamic method of analysis, it uses the as-built logic and the resulting as-built critical path to assess what the completion date would have been, but for the occurrence of the event. This is because as the delay events are progressively removed, the remaining activities have to be rescheduled to their earliest commencement and completion dates. There is some dispute among some delay experts as to whether an as-built critical path actually exists. This argument is based upon the premise that the critical path constantly changes throughout the currency of the works as a result of progress, lack of progress, and the occurrence of delay events. On this basis it is argued that there can be no single as-built critical path at the end of the works, as the actual critical path would have evolved and changed throughout the currency of the works.

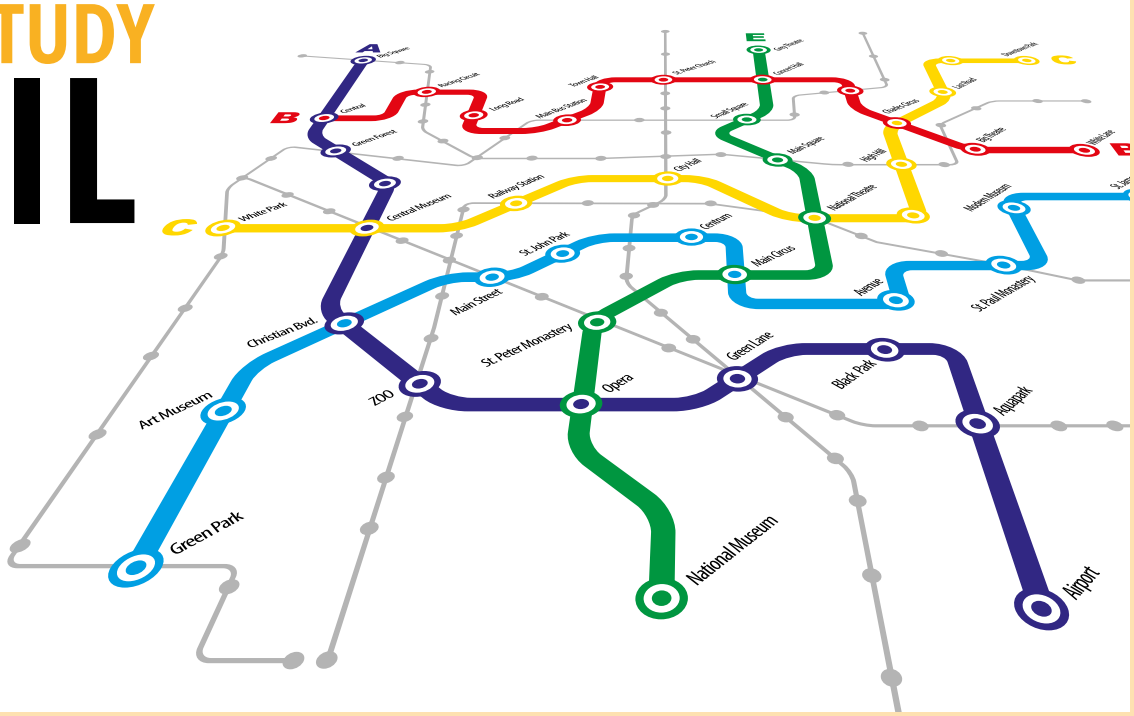
Setting aside the issue as to whether an as-built critical path exists or not, an as-built critical path can only show the critical path as it stood at the end of the works. It will not identify the critical path as it changes during the currency of the works, and therefore it will not show the critical path at the point in time a delay event occurred. This could result in some misleading conclusions. For example, an activity that was critical during the early stages of the works might have been genuinely delayed by a compensation event, but as the works progressed the delay to the construction activity was overtaken by other events. An as-built critical path might conclude that the construction activity was not on the critical path at the end of the works, and therefore incorrectly conclude that the compensation event did not in fact delay the completion date.

The starting point of the analysis is the as-built programme, which can be said to be rooted in fact. However, the moment a delay event is removed from the analysis and the remaining activities rescheduled to their earliest start and finish dates, the programme is no longer an as-built programme. It is a theoretical programme which identifies what the completion date would have been, had the event not occurred.

Some experts will therefore argue that the collapsed-as-built analysis is not grounded in fact, it cannot identify the critical path as it changed during the currency of the works, it contains logic which might not reflect the reasonable sequence of works that could be achieved, and whose results are theoretical. On this basis, they will assert that the collapsed-as-built, far from making sense, makes no sense at all.

However, the collapsed as-built method does have the advantage of overcoming the subjective nature of quantifying the amount of delay attributable to events associated with a pure as-planned versus as-built method, and its over reliance on the interpretation of the results by the person conducting the analysis. All methods of analysis have their advantages and disadvantages. It is incumbent upon the expert to select the appropriate method of analysis based upon the records available, cost of dispute, and the forum in which the dispute is to be resolved. It is also incumbent upon the expert to ensure that the method of analysis takes into account as much of the known available facts and records, and is as open and as transparent as possible. □

CASE STUDY
RAIL



ASSESSMENT AND DEFENCE/ REBUTTAL OF A DELAY AND DISRUPTION EXTENSION OF TIME CLAIM FOR ASSOCIATED COSTS IN ANTICIPATION OF ARBITRATION.

THE CLIENT

A large government roads and transport organisation.

THE PROJECT

The construction of a city rail system including construction of viaduct and overground stations, and tunneling and underground stations. The works included two lines, some 75 kilometres of track in total, and 42 stations.

THE DELAY

The project suffered initial problems and consequent delays due to identification of previously unforeseen existing underground services and the subsequent time it took for the statutory authorities to remove or divert as appropriate. Also, the JV main contractor claimed delays due to many global issues, and so created numerous heads of claim, some more credible than others.

However, with respect to the viaduct construction, the delay was not as great as the JV main contractor suggested. Essentially, although some interim completion dates had been missed, the JV completed the viaduct works thereabouts on time overall, by implementing mitigating measures. Therefore an EOT was not really what the JV main contractor was seeking, but rather it was the cost of disruption and the mitigation measures adopted.

THE BRIEF

To analyse, assess, and evaluate the claims, especially with respect to establishing the extent of the disruptive working that was experienced on the project. The direct effects of delays had been accounted for in most cases via the change orders; but the consequential effect had not. It was necessary to establish how the employer events had actually impacted on the works, in contrast with what the JV main contractor was alleging, and subsequently advise the client of what the claim was really worth.

THE ANALYSIS

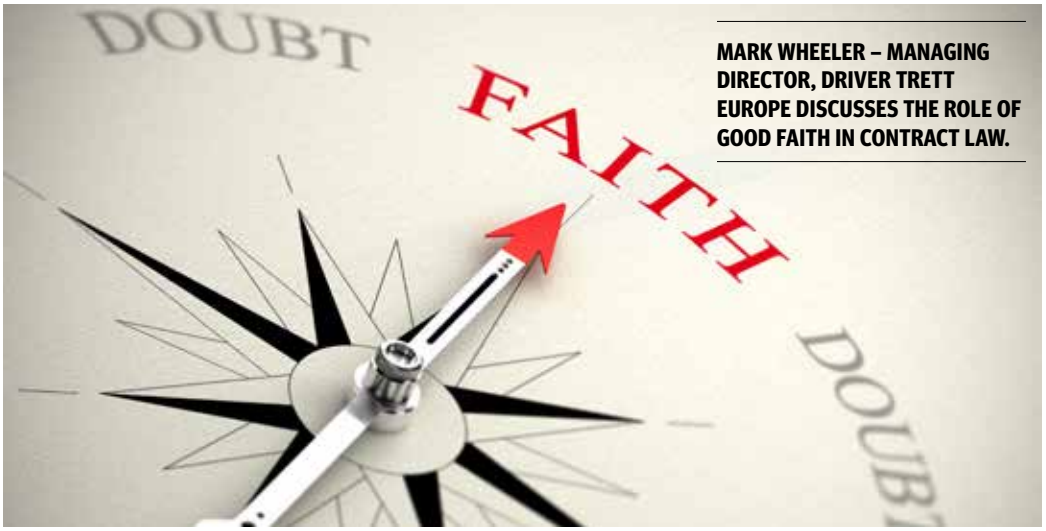
As-built programmes were quickly developed from progress data and site photographs and this was compared with the planned programmes for all the works, viaduct, tunnels, stations, workshops, rail systems, etc. Productivity output curves were produced from the contemporaneous site records for the key elements of the work to identify where the project suffered. The structural constructions of the stations were a particular area of contention requiring structural expertise to provide reports in order to establish liability of the delays to the cantilever sections, which were obvious to all.

Other areas of contention were with respect to the impact/effect of change. The client was prepared to pay for entitlements flowing from these agreed variations of the internal finishes of the stations, link bridges, etc., but needed again to know what the real cost was compared to the exaggerated and inflated JV main contractor claims. In particular, the concrete viaduct and linear works were analysed with time chainage charts that showed the planned programme, the impact of the delayed start due to utilities, the revised target programme, and the as-built programme sequence showing the disruptive nature of the construction.

THE RESULT

The dispute was heading towards arbitration, however a series of amicable settlement hearings avoided the conflict becoming too acrimonious, and both parties had a chance to voice their views and opinions, and make their case. The subsequent negotiations took time, but nevertheless agreements were reached, the arbitration suspended, and an eventual financial settlement was reached. The objective was to lower the JV main contractor's expectations and aspirations by establishing and proving the reality of the situation based on the facts, protecting the client and preventing monies being paid that were not due, which is what the client wanted. In other words, the client accepted the employer events, but did not want to pay any more than was right and proper and reasonable, and the final settlement figure had to be robust enough to withstand an audit of the public funds, with respect to the true worth and value of the claims. This was achieved through a common sense and pragmatic approach to the analysis of the delay and disruption, the entitlement to extensions of time, and loss and expense claims. □

You have got to have faith



MARK WHEELER – MANAGING DIRECTOR, DRIVER TRETT EUROPE DISCUSSES THE ROLE OF GOOD FAITH IN CONTRACT LAW.

The NEC3 form of contract contains many provisions within its core clauses, primary and secondary options, but few are quoted, misquoted or debated more than core clause 10.1, which provides:

"10.1 The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and cooperation."

The above quotation is made with emphasis on the part of this clause so often referred to. That emphasis is often not extended to the more important, but less appealing words which precede. The wording of clause 10.1 of NEC3 requires that parties to the contract "shall act as stated in this contract" before it goes on to mention the spirit of mutual trust and cooperation. The wording of the first part of this clause is written in the imperative "shall", whereas the requirement to act in the spirit described is simply added in as the second part of the sentence. In other words, that requirement to act in the spirit is secondary to the overriding obligation to "act as stated in this contract".

When disagreements arise, often one party will write to the other, advising them in writing that they are not acting in the spirit of mutual trust and cooperation. Over the last ten years or so, I am unable to recall a single case where such a letter resulted in the other party changing their view, upon having this obligation brought to their attention. Often the effect is quite the opposite. If you have to write to someone to tell them to play fair, the relationship is already on the rocks.

So what does this 'spirit of mutual trust and cooperation' actually mean? There are many debates that have centred on this issue. Perhaps the first thing to consider is what would happen without it. If clause 10.1 were deleted in its entirety, there are no other clauses in the contract that would be affected. Not one. The way work is carried out, payment is made, and defects are resolved is completely unaffected by this provision. Arguably, if there is no consensus as to its meaning, and nothing else is affected, the words must be superfluous and should be deleted.

Taking this action would no doubt cause a major outcry across the industry, as most believe it to have some meaning, even if it's hard to express in clear terms. The key question appears to be:

Does clause 10.1 amount to a good faith provision, and what effect if any does that have on the way the contract should be interpreted?

In order to answer this question, a review of good faith and its role in contract law is required.

Good Faith

In English contract law, there is no doctrine of good faith in contracts. This has been stated in a number of cases, including Interfoto v Stilletto in 1989 and Hadley v Westminster in 2003. In Interfoto, Lord Bingham pointed out that in many civil law jurisdictions, in contrast to the UK, good faith is recognised and enforced. He defined good faith as 'playing fair'. In Hadley, the long established maxim that there was no doctrine of good faith to be implied into English law was re-stated, and was found unnecessary to make the contract work. In Birse v St Davids , where a partnering agreement was entered into, the judge suggested that a contract would need to be considered carefully in the light of such an agreement, as contracts were not normally considered on the basis of good faith.

The words of clause 10.1 simply do not go far enough to imply good faith. Trust and cooperation are the operative words and impart no more than a minimum standard of behaviour. This situation will be different when option X12 is used, and partnering is under way.

The concept of good faith, has been variously described as playing fair, dealing straight, coming clean, and by one specialist as "acting in the spirit of good 'blokeishness'". It is fair to infer that most people have a fairly clear sense of what good faith actually is, and that perhaps trust and cooperation might, as a choice of words, fall a little short of a clearly expressed good faith provision.

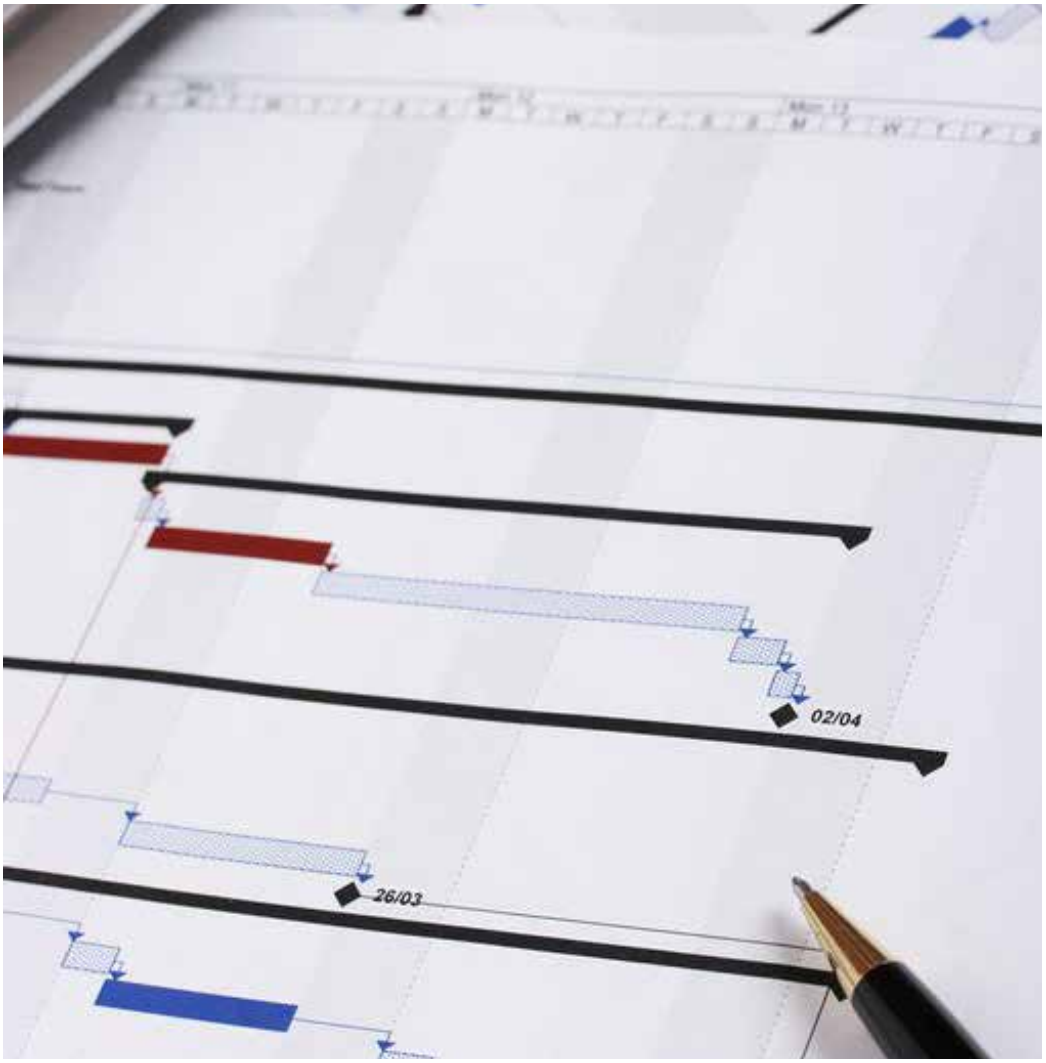
Equally, most people have a fairly clear sense of what bad faith means. Variously described as being sneaky, underhand, operating sharp practices and taking unfair advantage, we are back to a simple and common understanding of what is fair and what is not.

It is often, wrongly, considered that if an action is not in good faith then it must automatically follow that that action must be in bad faith. Good faith and bad faith do not simply butt up against each other. In other words, it is perfectly possible not to act in good faith, but to simply act neutrally and enforce obligations under a contract, without any hint of bad faith. Or mercy. This neutral behaviour might fall very short of the helping hand that good faith would provide, but could easily be operated without a hint of any bad faith.

Back to the NEC. If clause 10.1 is not a good faith provision, and appears to have no affect on the rest of the contract if removed, is it of any use at all?

Consider a situation where one party behaves poorly. Perhaps a quotation has been issued, and then withdrawn due to identification of an error. A replacement quotation is issued immediately, before the first was accepted. Some weeks later the project manager writes to accept the earlier quotation, which he has been told in writing is in error and ignores a written withdrawal and the replacement quotation. This type of behaviour is not acting in good faith, conversely it is an aggressive attempt to gain an advantage, contrary to the intent of the contract and has passed right through the neutral zone. It is at the very least, knocking on the door of bad faith.

Accepting a quotation you know full well to be wrong, while in possession of the correct details, it is certainly not acting in a spirit of mutual trust and cooperation. While clause 10.1 does not oblige good faith, or influence the neutral, it is certainly arguable that it could be construed as a warranty against acting in bad faith. On that basis, clause 10.1 is perhaps much more than the loose statement of intent that it first appears. Perhaps it draws a line in the sand, not between good and bad, but at least between neutral and bad. And that is no bad thing. □



Time bars under the 1999 FIDIC Suite of contracts; arguably a legal minefield?

NIALL LEONARD – ASSOCIATE DIRECTOR – SPECIAL PROJECTS, DRIVER GROUP MIDDLE EAST EXPLORES THE CHALLENGES OF NOTIFICATION PERIODS AND THE OPTIONS AND OBSTACLES AVAILABLE TO THOSE WORKING UNDER THE 1999 FIDIC SUITE OF CONTRACTS.

The construction industry is a difficult environment in which to successfully conduct business activities. The reasons are numerous, but it can be argued that onerous contractual clauses are having a profound effect for both experienced and inexperienced contractors should they fail to strictly follow the exact wording of contractual clauses. One such example of an onerous clause is a 'time bar' condition precedent clause, in which the failure to submit a notification of a claim within a defined timeframe would lead to the loss of a right to that claim.

A 'time bar' condition precedent clause typically arises where there is a requirement to grant an extension of time for the completion of the works. Lord Justice Salmon in the 1978 UK House of Lords case of 'Bremer Handelsgesellschaft Schaft v Vanden Avenne Izegem' outlined his understanding of the requirements or test of what constituted a condition precedent clause when he stated that,

'..had it been a condition precedent, I should have expected the clause to state the precise time within which the notice should have been served and to have made plain by express language that unless the notice was served within that the seller would lose their right under the clause'.

Therefore in accordance with Lord Justice Salmon, a 'time bar' condition precedent clause can only be in existence if there is a clear timetable for the notice to be served and the outcome, or consequence, is defined if the timetable is not strictly adhered to.

Clause 20.1, of both the 1999 FIDIC Red and Yellow Books, is an example of a legally enforceable 'time bar' condition precedent clause. It clearly complies with Lord Justice Salmons' test – there is a defined time period and the contractor is made fully aware of the consequences for any failure to comply, namely; complete loss of its rights. Clause 20.1 states the following;

"If the Contractor considers himself to be entitled to any extension to the Time for Completion and/or any additional payment...the Contractor shall give notice to the Engineer...as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance. If the Contractor fails to give notice...within 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim."

However, it can be argued that all might not be lost for a contractor who has failed to submit a notification in accordance with the strict timeframes outlined in clause 20.1 of the 1999 FIDIC Red and Yellow books; or under an alternative form of contract with a valid 'time bar' condition precedent clause. In his September 2007 paper 'The Rise and Rise of Time Bar Clauses for Contractors Claims – Issues for Construction Arbitrators' for the Joint Meeting of the Society of Construction Law and the Society of

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Arbitrators, Hamish Lal argues that there of two methods of challenging 'time bar' condition precedent clauses, namely; the 'Interpretation Argument' and the 'Prevention Principle Argument'.

Method Nr 1 – the 'Interpretation Argument'

The first method is the 'Interpretation Argument' whereby it can be argued that even if there is a valid 'time bar' condition precedent clause, there is no guarantee that the court system will enforce it.

Method Nr 2 – the 'Prevention Principle Argument'

The second method is the 'Prevention Principle Argument' whereby if it can be clearly demonstrated that the delays and / or costs suffered by a contractor are a direct consequences of actions and/or inactions of the employer, the 'time bar' clause can be challenged on the basis that no man should benefit from his own mistake – 'The Prevention Principle'.

It should be noted that whilst the two methods of challenging a 'time bar' condition precedent clause referred to in Hamish Lal's paper principally refers to the English and Welsh legal system, the principles could be applied in other jurisdictions. However, whilst Hamish Lal has offered some hope to Contractors, there are three legal obstacles that need to be understood before challenging a 'time bar' condition precedent clause in the courts.

Obstacle Nr 1 – Freedom of Contract

In forming an opinion on the fairness or otherwise of 'time bar' condition precedent clauses within the disparate standard forms of contract, it must be noted that the parties have willingly entered into a contract agreement with each other; there has been a meeting of minds or 'consensus in idem'. It can therefore be argued that the freedom of the parties to enter into a contract agreement is paramount to the principle of free trade.

Obstacle Nr 2 – The Prevention Principle as a rule of Construction

In the 1988 case of 'Alghussein v Eton College', Mr Justice Jauncey ruled that the 'prevention principle' is a rule of construction. He stated the following, namely,

"For my part I have no doubt that the weight of authority favours the view that in general the principle is embodied in a rule of construction rather than in an absolute rule of law".

Obstacle Nr 3 – Recent Legal Opinion in England and Wales

The courts in England and Wales are increasingly viewing 'time bar' and other condition precedent clauses as commercial bargains, freely entered into by the parties, who must accept the consequences. The courts therefore consider it their duty is to properly enforce and support such arrangements.

In what can only be described as a positive move for the construction industry, a new FIDIC 'Conditions of Contract for Design, Build, and Operate projects' which is also called the 'Gold Book' was introduced in 2008 and offered a more proactive and equitable 'time bar' condition precedent clause by outlining a revised clause 20.1 (a). The clause includes the following wording, namely:

'...However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers that the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28 day limit and advise both the parties accordingly...'.

The new FIDIC conditions of contract have arguably created an opportunity for contractors to have otherwise legitimate claims reassessed, even after the expiry of the strict notification periods typically associated with clause 20.1 of the 1999 FIDIC Red and Yellow Books. This would appear on balance, to be a more proactive, fair and common sense approach to managing contractual and commercial claims.

THIS ARTICLE HAS BEEN HEAVILY EDITED TO REDUCE THE WORD COUNT TO 1,000 WORDS. THE ARTICLE IS BASED ON A 15,000 WORD DISSERTATION SUBMITTED IN JUNE 2013.

CASE STUDY
High-Rise

THE PROJECT

This case study project was a 40-storey high-rise building, comprising of 18 floors of hotel from ground to level 18, and 22 floors of residential apartments from levels 19 to 40. The hotel guest rooms were located on levels 5 to 18, and the residential apartments were located on levels 20 to 40. The plant room floors were on levels 4 and 19, with hotel public areas on the 4 floors from ground to level 3, to accommodate the lobby, reception, restaurant, kitchen, business suites, meeting rooms, ballroom, gym and spa.

CONSTRUCTION

The construction of the building was a traditional in-situ FR concrete superstructure main frame (FRC columns and composite slabs – concrete topped metal decking), and was dependent upon 2 number concrete lift / stair cores, one to serve the hotel and another for the residences, and the envelope of the building is clad externally with glazed curtain walling.

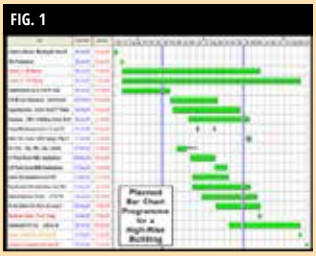
PLANNED PROGRAMME

The bar chart type programme provided below represents the original planned intent re the construction and fit-out of this 40-storey building.

A bar chart programme, see Fig. 1, typically has linear bars to represent activities and durations, and milestones for other key stages, such as the sectional completion dates, and the intent to temporary weatherproof the slabs at levels 12 and 21 to allow the internal fit out to progress, especially to the guest rooms to meet the earlier section 1 date for completion of the hotel.

Also the need for incoming mains service utility supplies to be available

FIG. 1



in Mar/Apr is highlighted to supply the plant room installations, and so in turn provide power, heat and water into the building to allow the internal fit of materials that are sensitive to the internal building environment in the winter period, to be installed, for handover of the hotel in March.

The early completion, and so operational use, of the hotel and residential lifts were also an important factor in the success of achieving the planned intent

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of the programme, as was the need to dismantle and remove the tower crane upon the completion of the external cladding.

LINE OF BALANCE CHART

The line of balance programme type chart, see Fig. 2, provides a much better graphical representation of the plan with regards to the portrayal of the interaction of the various activities, operations and dependencies required on this project.

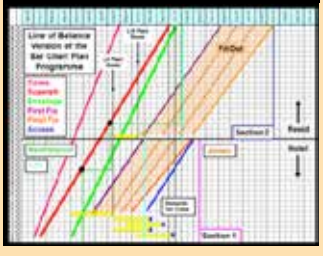
At first, the chart might look a little cluttered with the various layers, but if one concentrates on the coloured diagonal lines that track the planned progress for lift/stair cores (pink), superstructure frame (red), envelope (green), first fix (purple), etc., then the picture should become clearer.

For example, the superstructure red line, for the in-situ concrete frame works is planned to start mid-Feb at ground level and is planned to finish mid-Dec at roof level 40, some 10 months later.

Equally the bar chart version of the programme shows the 10 month superstructure frame period starting mid-Feb and finishing mid-Dec, but it does not show the vertical rise, and so does not track the intended progress position in between the planned start and finish dates.

When this vertical rise progress position is revealed then the correlation with other planned activities can be viewed. For example, at the end-Apr when the cladding is planned to start the frame should be at level 8, and when the level 12 slab is planned to be sealed at the end-May the envelope should be at level 4, and so the line of balance chart becomes more useful and informative than a bar chart.

FIG. 2



FEASIBILITY ISSUES

The presentation of the programme in a line of balance chart format reveals some feasibility issues with respect to the planned intent.

For example, the lift/stair core was constrained not to progress any more than 6 floors above the main frame superstructure due to structural stability. So at the end-Mar when the core was planned to be at level 11 and when the main frame was planned to be at level 5; the planned progress of the core from that date onwards would have to slow down, and so the completion of the core would have to finish at the end-Nov, some 3 months later than at the end-Aug as shown on the plan.

Although this particular feasibility issue would not affect the project critical path, it would have an implication on the planned costs (labour and plant), due to the prolonged resource associated with the construction of the lift/stair core.

Other feasibility issues are evident on the line of balance chart, with respect to the internal fit out progressing with sensitive second fix items being installed in the building without any permanent heat due to the late planned completion of the plant room on level 19, which would then require temporary heat provisions to be in place from end-Jul to end-Oct, and this might not have been allowed for in the tender bid.

Also with respect to the tower crane, which protruded through the lower floor slabs, as it could not be located in the lift shaft, as the lifts were required to be complete and operational early on; therefore the planned dismantle and removal of the tower crane in mid-Jan was not properly incorporated in the plan. Although a two month time slot post tower crane removal and before hotel sectional completion is evident, this would not seem to be adequate, as the main hotel kitchen on the first floor was affected.

AS-BUILT PROGRESS

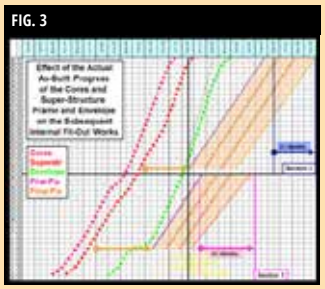
When the actual progress of the line of balance activities are plotted and overlaid onto the plan the impact is more obvious and can be seen more clearly than on a bar chart programme.

As can be seen in Fig.3, the actual progress of the lift/stair cores (pink dotted line) was never more than 6 floors above the actual progress of the main frame (red dotted line).

The envelope cladding works actually started 3½ months after the main frame started, instead of the 2½ month planned buffer period; and the overall completion of the envelope cladding did not complete ½ month after the main frame was complete as planned; in fact it was not finished until some 3 months later.

The consequential impact of the actual progress of the main frame and envelope works upon the subsequent planned internal fit out works can be easily demonstrated as shown on the chart above, which equates to a 4½ month delayed start to the section 1 hotel fit out and a 3½ month delayed start to the section 2 residential fit out.

FIG. 3



FORENSIC ANALYSIS

The forensic analysis of the planned and actual progress curves on the line of balance chart can help identify the cause of delay.

For example as can be seen in Fig.4, the in depth analysis of the envelope works, the deferred start of the envelope is clearly linked to the late frame, and possibly the late supply of cladding materials.

The subsequent slippage of 6 weeks was due to issues with respect to late fixing of the monorail to the L12 slab.

FIG. 4

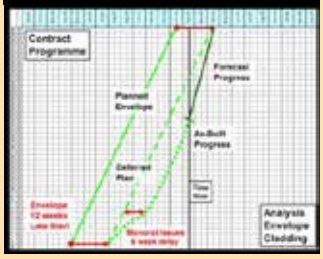
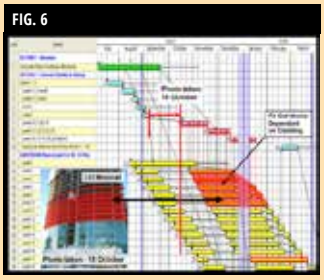


FIG. 5

FIG. 6



This can be further reviewed when one looks at the detailed bar chart for the hotel works, see Fig.5, where the internal fit out of the guest rooms can only progress so far without the external cladding to envelope the building (levels 6 to 10), and so provide the necessary protection against the weather.

This critical planned sequence and dependency on the cladding was, in the event, the actual critical cause of delay to the internal fit out of the guestrooms, which extended to at least 6 weeks. Fig.6 illustrates the impact of the late cladding with a cross-reference to a progress photo taken at the critical point in time; and so provides the necessary evidence and proof.

This dispute was taken to adjudication, and the above persuasive and powerful presentation charts proved successful; with the opposing party attempt to argue that the critical delay was with respect to internal fit out works and the impact of some minor variations.

Focus on...Middle East


The Driver Group regional team

Introducing a new member to our team in the Middle East

Driver Group is delighted to welcome Mark Bond, based in our Abu Dhabi office and focussed on business development across the Middle East region. Mark brings with him over 20 years of experience in undertaking commercial and contractual management assignments on major international projects in Asia, UK, and the Middle East for major international contractors and developers. Mark is a Member of the Royal Institution of Chartered Surveyors and a Fellow of the Chartered Institute of Arbitrators. Driver Group is very pleased to have him as a welcome addition to the team.

UPCOMING REGIONAL SEMINARS

Driver Trett's successful collaboration with leading international lawyers will continue later this year. Seminars are planned in conjunction with Dentons and Curtis to be held in Muscat. Further details will be circulated to our database members in due course or visit our website for further updates.

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Hot claims and haute cuisine

KEVIN J.A. MCPHILOMY - MANAGING DIRECTOR, DRIVER GROUP MIDDLE EAST REFLECTS ON OVER 40 YEARS OF INTERNATIONAL CLAIMS TRAVEL AND THE DELIGHTS AND CHALLENGES AWAY FROM THE NEGOTIATION TABLE.

One of the benefits of international claims work is that occasionally – when you can get out of the office or hotel room - you can experience the country in which you happen to be.

For me, the most exciting experience is to sample the local food. Some simply overwhelming, some underwhelming, and some positively poisonous! Here is a sample of my most memorable.

One claim took me to Yokohama to negotiate a settlement with the Japan Gas Corporation (JGC). On the JGC side of the table there were 14 Japanese managers and on the contractor's side of the table, just yours truly. After some time I managed to arrange the business cards into the same order as the JGC members sitting around the table which allowed me to address each person by name, which is of course very important etiquette in Japan. After several hours of a very intense and difficult meeting, we broke for lunch to the executive dining suite.

I can honestly say that I have never eaten such good food before or since. Comprising a variety of fresh fish, seaweed and vegetables, rice, and pickles, the main dish was a whole fish served live with hot oils poured over it. It is considered a great delicacy and if not eaten properly, can make you very ill! When pressed to eat it I politely declined stating that the fish was too 'rare' for me and that I liked my fish cooked, so to speak. It was just a little too 'fishy' for me.

When we returned to the meeting room, after a 20 minute compulsory power nap, the JGC staff all sat in different positions, leaving me at a complete loss in identifying each person by name and causing me some confusion - a very clever Japanese tactic!

In Nairobi for an arbitration hearing, we visited a restaurant called Carnivores, on the outskirts of Karen. The food was served by Masai Warriors in traditional dress and all of them over six feet tall. Each warrior carried a six foot long skewer with different cuts of meat and would carve the meat onto your plate from the skewer.

My first bite was delicious - very tender and succulent - and when I enquired what it was the reply was wildebeest. The next sample was also delicious and when I again enquired, the reply was giraffe. Next was zebra.

Another warrior arrived and started to carve meat onto my plate. It was delightful and I told him that it was the tastiest and most delicious meat I had ever eaten. It was wonderful. I had never eaten anything quite like it before.

> The warrior replied in a deep, bass voice, chicken.

Believing this to be an even more 'exotic' cut of meat, I again asked the warrior what animal it was from.

The warrior replied in a deep, bass voice, chicken.

One of my most memorable dinners was in Sydney, Australia following a meeting to negotiate an exit from a particularly onerous contract for the supply and erection of support steelwork on an oil and gas project in Kuwait. I managed to negotiate the removal of the erection portion of the contract with minimum penalty – we were delighted, the Australian contractor was furious, but had no option but to accept. Being very magnanimous he nevertheless invited both my managing director and I to dinner at the Royal Sydney Yacht Club that evening.

We started with oysters, followed by Black Angus Steak with gratin dauphinois and fresh asparagus, complimented by a bottle of the best Hunter Valley house red that I have ever sampled and completed with coffee and liqueurs. Our host encouraged us to select the most expensive liqueurs and vintage port as he himself was doing.

At the end of a sumptuous meal our host excused himself and went off in the direction of the cashier's desk.

After 20 minutes, we wondered where he had got to. The waiter approached our table and when asked of the whereabouts of our host, replied that he left the premises ten minutes earlier.

At that point I was presented with the bill and a note from our host; "Ha, Ha – got you" – but in rather more colourful Australian language!

It was a very expensive meal.

I have had to date a very interesting and mobile career in quantity surveying and claims which has taken me to most parts of the world and allowed me to eat in some of the best and the worst restaurants.

Often, I am asked my favourite place in the world and my favourite meal.

Both questions are easy for me to answer – Glasgow, and a special fish supper from Romy's, Govan Cross. □

KOBUS HAVEMAN – DIRECTOR, DRIVER GROUP OMAN HIGHLIGHTS THE RAPID AND VARIED GROWTH OF THE OMANI TOURIST INDUSTRY AND THE RELATED CONSTRUCTION CHALLENGES.

Oman forecast increased hotel sector growth

The Sultanate of Oman has seen a considerable expansion of the country's tourism sector led by a combination of government and private sector in an effort to compete with the growing tourist market across the Gulf Cooperation Council (GCC). This comes on the back of a study by a leading travel agency showing that the growth in inbound tourism for the United Arab Emirates (UAE) has increased over 20% year on year with the USA leading, followed by Australia at 14%, the UK at 10%, France at 6%, and India at 5%.

To cater for this increase in demand and to compete for the increased tourism travel to the Middle East, Oman Tourist Development Company (Omran) the investment arm of the government and its joint venture affiliates will add around 3,650 new hotel rooms in four and five star categories in the next five to seven years. To ensure hotels can serve a larger pool of customers, authorities are looking to encourage construction of one, two, and three star hotels. New hotel developments are also emerging in a wide range of geographical locations across Oman such as Khasab, Sohar, Sifa, Duqm, Salalah, and Nizwa, attracting international brands such as Intercontinental, Four Seasons, Missoni, Movenpick, Club Med, Rotana, Radisson Blu, and Banyan Tree Resorts to name a few.

This tourist sector expansion is further boosted by the proposed redevelopment of Mutrah Port, the historical and cultural heart of Muscat. It houses some of the oldest souqs (bazaars), mosques and forts as well as the Muttrah harbour, the city's major harbour. The port attracts cruise tourism, one of the most dynamic and fastest growing components of the leisure industry worldwide and Oman is also slowly getting on the world cruise tourism map.

Growing at a rate of 12% per annum globally, cruise shipping is making considerable headway in the Sultanate. In 2010, 109 cruise ships called at the Muscat Port carrying 340,000 passengers. The government now plans to develop Muttrah as a cruise ship exclusive port to encourage more cruise shipping companies.

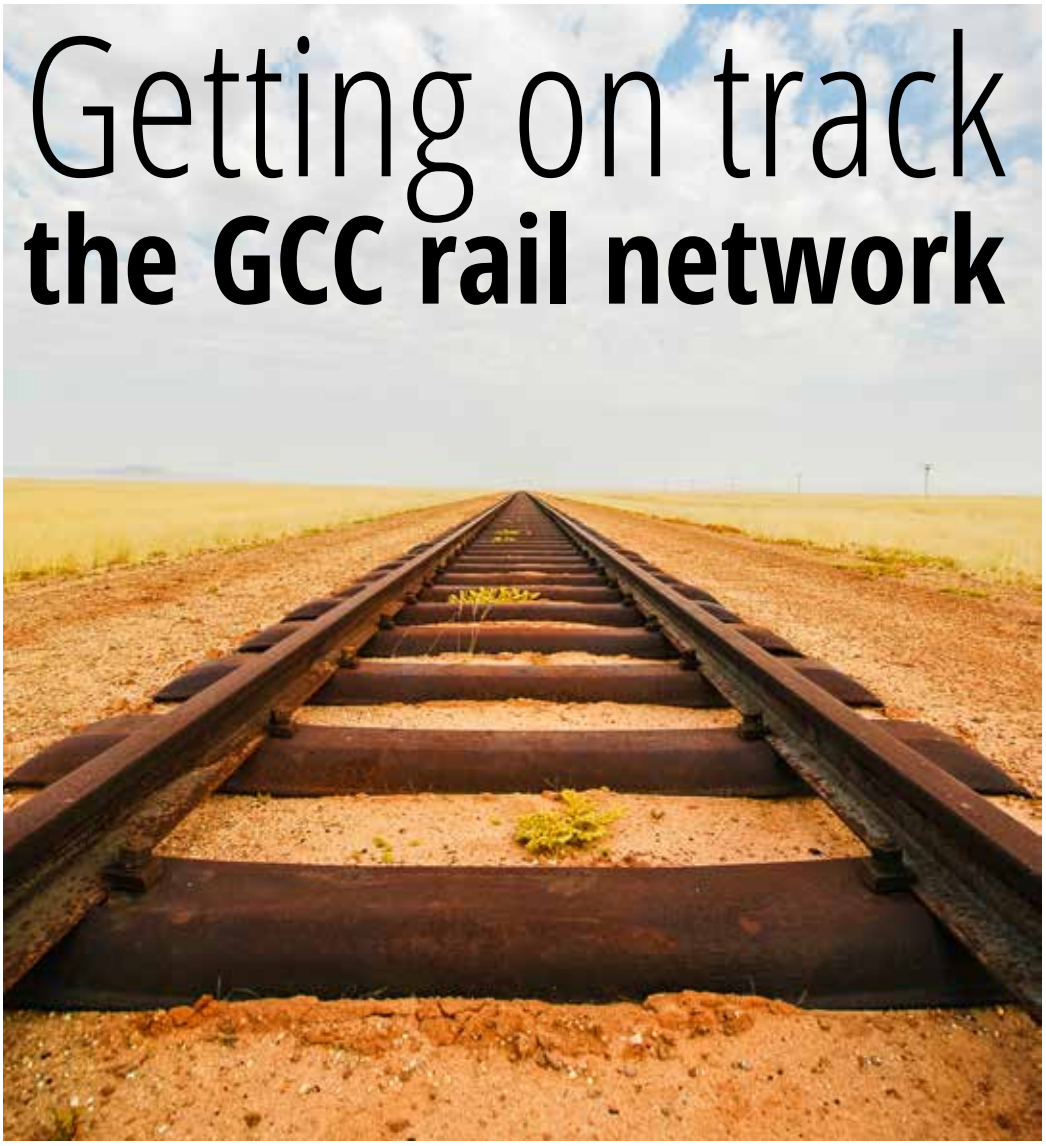
The rapid growth of large integrated tourism complexes (ITCs) have also attracted regional investors, as evident from the memorandum of understanding signed in July 2012, between Oman's Ministry of Tourism and Qatari Diar; the property arm of Qatar's sovereign wealth fund. ITCs are areas designated by the government in which non-Omani individuals and companies can purchase or build units for residential and investment purposes and this is further fuelling inward investment. These are all positive indicators that Oman is an attractive and stable investment opportunity for other GCC and international investors.

However, in common with projects planned across the region, the rapid development of tourist facilities will undoubtedly be influenced by rising construction costs as the competition for resources increases to fever pitch.

Securing materials and equipment is one element, and the Sultanate's Government has a clear strategy to reduce independence on expatriate workers and increase 'Omanisation' across all industry sectors. The question is whether there are sufficient resources to educate and train Omani nationals in time and if they will have acquired adequate experience to deliver such ambitious and complex projects? Only time will provide the answer. □

Oman Tourist Development Company and its joint venture affiliates will add around 3,650 new hotel rooms in four and five star categories in the next five to seven years.

Getting on track
the GCC rail network



NIALL LEONARD – ASSOCIATE DIRECTOR – SPECIAL PROJECTS DRIVER GROUP, MIDDLE EAST EXPLORES THE DEVELOPMENT OF THE RAIL NETWORK IN THE REGION.

In a move towards the betterment of transport and economic links within the Middle East and North Africa (MENA) region, the six countries of the Gulf Cooperation Council (GCC) Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE) have jointly agreed to plan, develop, and operate an international railway system to facilitate the movement of goods and people across the region.

Whilst the various proposals are still under consideration, it is envisaged that the proposed railway will be constructed in phases. Phase one will involve the expenditure of over US$30 billion to facilitate the construction of approximately 2,100km of railway through Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE. The railway will start close to the Iraqi border in Kuwait via Dammam in Saudi Arabia to Bahrain via a proposed causeway (to be constructed). The railway will then connect Bahrain to Qatar via the Qatar-Bahrain causeway (to be constructed) before reconnecting with Saudi Arabia. The final stage of the line will then pass through the United Arab Emirates (Abu Dhabi to Al Ain) before coming to an end in Muscat in the Sultanate of Oman.

The proposed specification for the project is very high as the track will be prepared to facilitate trains travelling at a maximum speed of 320km per hour once the network has been completed. However, initially passenger trains will travel at speeds closer to 200km per hour whilst cargo trains will travel at 80-120km per hour. Once the network has been completed, there is a potential for the GCC railway to be connected to Europe or Asia via Turkey.

It can be argued that whist the commitment of the GCC countries is an important step towards the delivery of the project, its success is not guaranteed as agreement still needs to be reached on GCC level regulatory and legal frameworks under which the respective national authorities can deliberate and agree on technical, safety, commercial, and legal issues. As an example of the potential problems that need to be overcome before the project can be delivered, the following problems have been identified, namely:

- Technical issues – the various GCC national railways will need to have uniform standards for the gauge size of tracks and the locomotives which can run on these tracks, particularly along cross-border rail segments.
- Safety issues – of crucial importance, each railway's signal and communication systems must be compatible and integrated.
- Commercial issues – for example, agreeing to a common fare structure across the GCC.
- Legal and regulatory issues – implement a joint customs system to allow a single point of entry into the GCC and a uniform custom tariff for imported goods.

If and when the disparate stakeholders overcome the potential problems associated with the delivery of the GCC railway, it can be argued that the completed networks will be of considerable benefit to the people living, working, and conducting business throughout the region. The project will generate significant employment opportunities for GCC nationals, promote integration, facilitate economic development, advance the GCC as a common market and customs union, and facilitate further international trade. The proposed GCC Railway Network will also reduce maintenance costs on roads, reduce the carbon footprint of goods, and support the development of national railway industries.

As outlined in this article, the construction of the GCC Railway Network will require significant commitment from the six member countries of the GCC to ensure its successful delivery in a timely manner. The required commitment is not only in terms of initial financing and resources but, more importantly, a common commitment to political unity and skilful diplomacy to overcome changing stakeholder requirements, disparate political aspirations and a commitment to agree on common standards and specifications. □

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ANALYSIS ACTION RESOLUTION

THE DIGEST NEWSLETTER
BYTES

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In the next issue

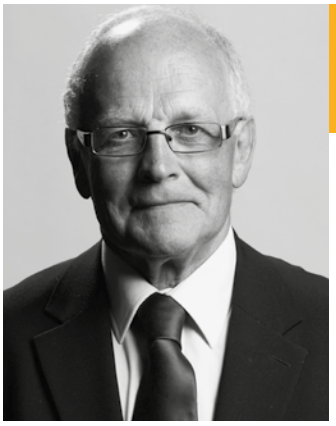
The next issue of Digest will have a focus on Africa, with news and articles about the region. We will start the new year by taking a look back at highlights of 2013 across various Driver regions and sectors, and a look forward to what we can expect across the engineering and construction industries in 2014.

The Digest will always aim to be topical, and respond to requests and questions from our readers through the articles we publish. If you would like to submit a question or an article request to the Digest team please email info@drivertrett with DIGEST in the email subject line.

We are always pleased to receive feedback from our readers, and welcome the opportunity to develop the Driver Trett Digest into a valuable read for those involved in the global engineering and construction industry.

BYTE 1:
FIDIC RAINBOW SUITE 3

Paul Battrick and Phil Duggan consider programming requirements in conjunction with procedures in respect of progress reporting. The parties to the contract and the engineer, but in particular the contractor, all have clear obligations in respect of the programming and reporting of functions within the FIDIC forms.



BYTE 2:
GETTING THE MOST FROM YOUR EXPERT

DIALES expert Peter Davison explores the differences between the experts and expert advisors while arguing the importance of early engagement.

COMPETITION

The Expert Witness in Construction is the latest book release to be co-authored by DIALES expert John Mullen. The book explains, in practical terms, the way in which experts work with particular reference to the construction industry. For a chance to win a copy please see the question below:

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